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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, *et al.*,
Appellants,

v.

LEONARD PAUL HODORY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF APPELLEE

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FOR ARGUMENT

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Vs.

LEONARD PAUL HODORY,

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SUPPLEMENTAL BRIEF OF APPELLEE AND ERRATA IN CORRECTION
OF APPELLEE'S BRIEF IN CHIEF

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SUPPLEMENTAL BRIEF OF APPELLEE AND ERRATA FOR CORRECTION
OF APPELLEE'S BRIEF IN CHIEF

Appellee, pursuant to Rule 41(5) of the Rules of the Supreme Court of the United States, respectfully submits the following late authority which was not available in time for inclusion in the Brief of Appellee in this case.

(A) Discussion of Kistler v. Industrial Comm'n.

Subsequent to the filing of appellee's brief in chief on this appeal, appellee's counsel became aware of the decision of the Supreme Court of Colorado in Kistler v. Industrial Comm'n, _____ Colo. _____, 556 P.2d 895 (1976), decided November 29, 1976, first published in the January 7, 1977 issue of the Pacific Reporter, and not available to counsel for appellee at the time of the filing of the Brief of Appellee. The Supreme Court of Colorado in the Kistler case, for the third time in less than four years (see Spann v. Industrial Comm'n., 181 Colo. 153, 508 P.2d 385 (1973), Brief of Appellee, p. 22; Sylvara v. Industrial Comm'n., _____ Colo. _____, 550 P.2d 868 (1976), Brief of Appellee, pp. 22, 52), struck down a disqualification from receipt of benefits under the unemployment compensation law of that state on the ground that the provision violated the Fourteenth Amendment to the Constitution of the United States.

The statute in issue in Kistler disqualified an individual, who voluntarily left employment because of marital or other domestic obligations, from receipt of unemployment compensation benefits unless the individual subsequently worked for at least 13 weeks in new employment. The thirteen-week requirement was not imposed upon individuals who voluntarily left employment for no reason at all, although other penalties were imposed. The Court found that the classification lacked a rational basis, and therefore violated the Equal Protection Clause of the Fourteenth Amendment. Surely, if this discrimination between individuals whose unemployment was voluntary is invidious in the constitutional sense, the discrimination in the instant case between appellee and his fellow steelworker, and other involuntarily unemployed individuals is clearly invidious.

(B) Errata in correction of Brief of Appellee

Appellee respectfully submits the following errata in correction of his brief in chief:

1. Page 29: Fifteenth line of text--change "benefit" before "of" to "bereft"

2. Page 35: Sixth line under heading 4.a.--change "volutary" before "character" to "voluntary"

3. Page 42: Eighth line of first full paragraph--change "Appellee" before "has" to "Appellant"

4. Page 45: Twenty-fifth line of text--change "of" at end of line to "an"

5. Page 48: Seventh line of text--change "it" before "not" to "is"

6. Page 55: Fourteenth line of text--insert after "(1972)" at beginning of line ", appeal dismissed, sua sponte, by Supreme Court of Ohio on ground no substantial constitutional involved, motion to certify record overruled by Supreme Court of Ohio, Jan. 12, 1973, Case No. 72-786, Vol. XLVI Ohio Bar No. 4, pp. 83-84, 87"

7. Page 56: Fifth line of first full paragraph--change "to" before "opinion" to "the"

8. Page 59: Eighteenth line of first full paragraph--change "ans" before "was" to "and"

9. Page 60: Fourteenth line of text--change "neigher" at beginning of line to "neither"

Respectfully submitted,

T. PATRICK LORDEON
on behalf of

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The facts which formed the basis of the proceedings and decision below are adequately and concisely set forth in the Findings of Fact in the opinion of the District Court below. (*Hodory v. Ohio Bur. of Emp. Services*, 408 F. Supp. (N.D. Ohio E.D. 1976)), and appellee adopts those Findings (408 F. Supp. 1018) as accurately reflecting the factual context in which the legal issues presented in this appeal must be determined.

Appellee does not take exception with the Statement of the Case presented in the Brief of the Appellant insofar as it is in conformity with the findings of the District Court. However, appellee deems it necessary to correct certain inaccuracies in the Statement of the Appellant.

The appellant misleads the Court wherein he states that Section 4141.29(D)(1)(a) of the Ohio Revised Code contains "essentially the same language as the original statute enacted in 1936." (Brief of the Appellant at p. 2.) The text of the 1936 labor dispute disqualification limited the denial of unemployment benefits to those individuals who lost their employment because of a strike "in the establishment *in which [they were] employed.*" (See, e.g., Brief of Republic Steel Corporation as *amicus curiae* at p. 8; also discussed below at Part C.) The 1963 amendment broadened the definition of establishment to include "any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed. . .".

Appellant's reassertion of the posture of the proceeding below, insofar as it tends to convey the impression that the District Court decided the case on substantive constitutional issues not briefed or argued, strains credulity. It cannot be determined how appellant arrived at the summarized six issues at p. 5 of his brief, however, the equal protection and due process issues were raised in the Complaint and were briefed and argued by both parties in the Court below.

Although no evidence was presented by the appellant, it cannot be said that the appellant was denied such opportunity. Appellant interposed no objection prior to or during the hearing below. Appellant did not seek to introduce any evidence in the District Court, nor did he request, by motion following the judgment, leave to introduce any evidence.

SUMMARY OF THE ARGUMENT

The State of Ohio has disqualified appellee and a class of necessitous, unemployed workers from receiving unemployment benefits due to a labor dispute involving their employers. The labor dispute consisted of a nationwide strike by the United Mine Workers affecting mines owned by the employers of appellee and his fellow steelworkers. Said steelworkers were employed in steel-making facilities and were in no way participating in, financing or directly interested in the labor dispute.

The foundation for the federal-state system of administration of unemployment compensation is the Social Security Act. Although certain latitude is allowed the states in their methods of administration, such methods must be reasonably and properly designed so as to be in harmony with the purpose of the Act. The well-articulated purpose of the unemployment compensation program is to provide a substitute for wages during a period of total or partial unemployment, to workers unemployed through no fault of their own. It follows that the denial of unemployment benefits to appellee and others similarly situated was in fatal conflict with the controlling federal purpose.

The only class of *involuntarily* unemployed workers ineligible for benefits under Ohio's disqualification provisions (contained in Section 4141.29 of the Ohio Revised Code) prior to December 1, 1975, were those individuals who fell within the labor dispute disqualification found in O.R.C. Sec. 4141.29(D)(1)(a). The various other classifications of disqualified individuals contained in O.R.C. Sec. 4141.29 involve some element of fault on the part of the individual claiming benefits. The labor dispute disqualification which mandates the denial of unemployment benefits to a class of individuals who through no fault of their own were

laid-off because of a labor dispute occurring in facilities owned or operated by their employers, is violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The statute in question also violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. While the State of Ohio, pursuant to its police power, concededly has broad latitude in enacting legislation, its legislation must be reasonable and must bear a real and substantial relation to a legitimate state purpose. Also, its legislation must not, in order to be constitutional, create a conclusive presumption which is not universally true in fact. The Ohio statute under consideration as it relates to appellee does not bear a real and substantial relation to the statute's legitimate purposes; furthermore, said statute creates a conclusive presumption, which, as demonstrated by the facts of the present case, is not universally true in fact. Therefore, said statute is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Finally, U.S. Steel Corporation and Republic Steel Corporation, the employers of appellee and other class members, suffered no deprivation of constitutional rights. First, the question of whether these corporations should have been party litigants in the proceeding before the three judge court was never properly presented to the lower court, either by the appellant or by said companies. Secondly, no authority supports the appellant's assertions that: (a) the two steel companies were denied their substantive and procedural due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution; (b) and that the lower court's decision is violative of the Tenth Amendment to the U.S. Constitution. Next, U.S. Steel and Republic Steel were not indispensable parties to this litigation

because they were not necessary parties under Rule 19(a) of the Fed. R. Civ. P., and being a necessary party is one prerequisite in order to qualify as an indispensable party under Rule 19(b) of the Fed. R. Civ. P. Furthermore, assuming that these two corporations have some interest in the present case, that interest has been vigorously represented by the appellant; moreover these companies, by filing briefs as *amici curiae*, have themselves protected whatever interest they have inasmuch as their arguments relative to the merits of the case are before this Court.

A.

THE OHIO SYSTEM OF UNEMPLOYMENT COMPENSATION, INSOFAR AS IT REQUIRES DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS TO PERSONS UNEMPLOYED BY REASON OF LABOR DISPUTE, WHERE SUCH PERSONS ARE NOT PARTICIPATING IN, FINANCING, OR DIRECTLY INTERESTED IN THE DISPUTE, IS IN FATAL CONFLICT WITH CONTROLLING FEDERAL LAW.

Although the appellant is in error asserting the Court below decided this cause favorably to the Plaintiff on statutory, rather than constitutional, grounds, it is nevertheless appropriate that appellee set forth the statutory argument in support of the judgment of the District Court. The statutory issue was raised and argued by the appellee in the Court below and the appellee urges its consideration herein in support of affirmance. *Fusari v. Steinberg*, 419, U.S. 379, 387, 42 L. Ed.2d 521, 528 (1975). This alternative argument is advanced, therefore, in recognition of this Court's

tradition that disposition of cases should, if possible, be on statutory rather than constitutional grounds. *e.g.*, *Harmon v. Brucker*, 355 U.S. 579, 581 (1958).

The Ohio unemployment compensation system is governed by, and financed in part under, the provisions of the Federal Social Security Act (42 U.S.C. Sec. 501 *et. seq.*) as well as the Federal Unemployment Tax Act (26 U.S.C. Sec. 3301 *et. seq.*). Section 302(a) of the Social Security Act provides, in pertinent part:

> The Secretary of Labor shall from time to time certify to the Secretary of the Treasury for payment to each State *which has an unemployment compensation law approved by the Secretary of Labor under the Federal Unemployment Tax Act*, such amounts as the Secretary of Labor determines to be necessary for proper and efficient administration of such law . . . (Emphasis Added) (42) U.S.C. 502 (a)).

Section 303(a)(1) of that Act further requires that the State law be approved by the Secretary of Labor under the Federal Unemployment Tax Act and that methods adopted by the state systems be reasonably calculated to insure full payment of unemployment compensation when due (42 U.S.C. Sec. 503(a)(1)).

In the absence of a purpose clause relative to the aforementioned Social Security and Federal Unemployment Tax Act legislation, the intent of Congress in establishing a system of unemployment compensation can be determined by reference to the legislative history. *Accord, Welsh v. United States*, 398 U.S. 333, 347 (1970) (Harlan, J., Concurring). The purpose of Congress in enacting the unemployment compensation program was to provide a substitute for wages lost during a period of unemployment *not the fault of the employee*. Report of Committee on Economic Security, Hearings on S. 1130 before Senate Committee on

Finance, 74th Cong., 1st Sess., 1328 (1935). This clear federal purpose was also enunciated in the proposed draft bills for state legislatures adopted by the Federal Social Security Board, which provided that the purpose of unemployment compensation legislation was to provide benefits to persons *unemployed through no fault of their own.* See U.S. Social Security Bd., Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types (Rev. Ed. 1937), quoted in the *Purposes and Provisions of the "Labor Dispute" Disqualification from Unemployment Compensation*, 56 Northwestern U.S. Rev. 662, 663 (1961); see also, *Effect of Participation in Labor Dispute upon Continuation of Unemployment Benefits*, 56 Cornell L.Q. 738, 749 (1967). The draft bills were widely used by state legislatures in adopting their own unemployment systems and the "no fault" concept, as it pertained to labor dispute disqualifications, was almost universally adopted (See detailed discussion *infra* at Part C). As observed by the lower court, Ohio's own statutory disqualification section (O.R.C. Sec. 4141.29) indicates "that the overall purpose of the legislation is to provide benefits as compensation for loss of remuneration due to *involuntary* total or partial unemployment. *Hodory v. Ohio Bureau of Employment Services*, 408 F. Supp. 1016 (1976).

Involuntary unemployment has been more recently articulated as the evil sought to be cured by the system of unemployment benefits. Prior to passage of the "Employment Security Amendments of 1970," Act of August 10, 1971, Pub. L. No. 91-373, the United States Senate Finance Committee declared as follows:

> The committee believes that the disqualification provisions of State unemployment compensation laws should be devised so as to prevent benefit payments to those responsible for their own

> unemployment, without undermining *the basic objective of the unemployment insurance system—to provide an income floor to those whose unemployment is beyond their control . . . Severe disqualifications . . . are not in harmony with the basic purposes of an unemployment insurance system.* S. Report No. 91-752, 91st Cong. 2d Sess., 24 (1970) (Emphasis added).

In its analysis, by section of the "Employment Security Amendments of 1970," the House Ways and Means Committee reported with respect to amended 26 U.S.C. Sec. 3304(a)(10) that the requirement (restated in its entirety below).

> . . . would not prevent a State from specifying the conditions for disqualification such as, for refusing suitable work, for voluntary quitting, for unemployment *due to labor dispute—in the worker's plant*, etc. H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 19 (1969). (Emphasis supplied.)

Although the House Committee Report expresses an opinion that the States may disqualify "for unemployment due to a labor dispute in the worker's plant," the tacit inference which may be drawn from the statement is that no disqualification should be imposed wherein the labor dispute exists outside the worker's plant.

This Court, in a unanimous, landmark decision in the area of unemployment compensation law, declared a state unemployment compensation statute invalid as being in conflict with Section 303(a)(1) of the Social Security Act in *California Department of Human Resources Dev. v. Java*, 402 U.S. 121 (1971). Chief Justice Burger, in delivering the opinion of the Court in *Java*, clearly indicated that the purpose of Congress in enacting the unemployment compensation program was to provide a substitute for wages lost during a period of unemployment *not the fault of the employee* (402 U.S.

130). It follows, accordingly, that a state statute which operates to deny unemployment compensation benefits to otherwise eligible persons who are involuntarily unemployed without fault of their own, is in constitutionally fatal conflict with the controlling federal statutory scheme, unless it can be somehow harmonized with federally sanctioned purposes.

Appellant argues that Congress intended to create "procedural" rights in the unemployed, leaving the "substantive aspects" of eligibility or disqualification wholly within the states' province (Appellant's Brief at pp. 24-31). Appellant further attempts to distinguish *Java, supra*, on the basis that *Java* merely creates procedural, rather than substantive, rights. The attempt to characterize this issue as merely substantive-procedural is deceptively misleading. There is no authority supporting such a principle. The citations at p. 27 of Appellant's Brief of *Fenoff v. Vermont*, Civil No. 73-264 (D. Vt., Sept. 26, 1974), 1A CCH Unempl. Ins. Rep., para. 21, 437 (1974) and *Nevills v. Illinois*, 388 F. Supp. 622 (1974) as directly supportive of the position that 42 U.S.C. Sec. 501 *et seq.* "addressed only procedural and *not* substantive federally secured rights" are wholly inappropriate. Neither the *Fenoff* nor *Nevills* opinion articulates any such procedural-substantive dichotomy. Rather, in dismissing claims attacking a one-week waiting period for the payment of unemployment benefits, the Courts held that the purpose of the Social Security Act as determined by this Court in *Java* (*supra* at 131) was to give partial as opposed to total replacement of wages to the unemployed. The significant import of *Java*, as well as *Fenoff* and *Nevills*, lies in their consideration and use of the purposes of the federal unemployment laws in determining whether unemployment claimants' rights have been subverted by state laws inconsistent with Congressional intent.

Another argument urged by the appellant is that the federal unemployment legislation creates no federal substantive rights. As early as 1935, the Federal Unemployment Tax Act (26 U.S.C. Sec. 3301 *et seq.*), companion legislation to the Social Security Act (42 U.S.C. Sec. 501 *et seq.*), required, in order that each state law receive the approval of the Secretary of Labor, that:

> (5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> (A) if the prosition offered is vacant due directly to a strike, lockout, or other labor dispute;
> (B) if the wages, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
> (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization. 26 U.S.C. Sec. 3304(a)(5)

Subsection (5) of 26 U.S.C. Sec. 3304(a) represented one of six requirements for federal approval of state laws. Although Subsection (5) was the only requirement dealing directly with standards of eligibility, it is evident that Congress provided substantively that no state could force an unemployment claimant to accept certain kinds of employment in order to maintain his eligibility.

Since 1935, moreover, there have been two recent amendments to 26 U.S.C. Sec. 3304, both of which bear upon eligibility standards. The "Employment Security Amendments of 1970," Act of Aug. 10, 1970,

Pub. L. No. 91-373, added seven new requirements for approval of state laws (26 U.S.C. Sec. 3304(a)(7)-(13)). Among these seven requirements, the following bear directly upon eligibility standards:

> (8) Compensation shall not be denied to an individual for any week because he is in training with approval of the State agency (or because of the application, to any such week in training, of State law provisions relating to availability for work, active search for work, or refusal to accept work);
>
> (9)(A) Compensation shall not be denied or reduced to an individual solely because he files a claim in another State . . . or because he resides in another State . . . at the time he files a claim for unemployment compensation; . . .
>
> (10) Compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of his benefit rights for any cause other than discharge for misconduct connected with work, fraud in connection with a claim for compensation, or receipt of disqualifying income; . . .
>
> (12) Each political subdivision of the State shall have the right to elect to have compensation payable to employees thereof . . . 26 U.S.C. Sec. 3304(a).

Additionally, the "Unemployment Compensation Amendments of 1976," in increasing the number of requirements for approval of state laws from 13 to 16, by substituted second subsection (12), requires, effective January 1, 1978, that "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy." Act of Oct. 20, 1976, Pub. L. No. 94-566 Sec. 312(a), amending 26 U.S.C. Sec. 3304(a)(12).

The above requirements for approval of state laws are but a small segment of recent federal amendments affecting the systems of unemployment compensation. Persistent, high levels of unemployment during the last several years have brought about a significant congressional response. Enactments include the "Employment Security Amendments of 1970," Act of Aug. 10, 1970, Pub. L. No. 91-373; "Emergency Unemployment Compensation Act of 1971," Act of Dec. 29, 1971, Pub. L. No. 92-224; "Emergency Unemployment Compensation Act of 1974," Act of Dec. 31, 1974, Pub. L. No. 93-572; and "Unemployment Compensation Amendments of 1976," Act of Oct. 20, 1976, Pub. L. No. 94-566. The 1970 Amendments significantly broadened the definition of "employer," reducing the number of individuals employed from four to one (26 U.S.C. Sec. 3306(a)); increased the amount of wages subject to the Federal unemployment tax from $3,000 to $4,200 (increased to $6,000 effective January 1, 1978 per 1976 Amendments) (26 U.S.C. 3306(b)); expanded coverage to certain individuals in the employ of a state wherein, hospitals or institutions of higher education may elect to provide coverage for their workers (26 U.S.C. Sec. 3309(a)); and, established a federal-state extended unemployment compensation program whereby benefit periods of eligibility could be extended by as many as 13 weeks (26 U.S.C. Sec. 3304(a)(11)). The Acts of 1971 and 1974 provide for an extension of the "emergency benefits" initiated in the Act of 1970 and increase from 13 to 26 weeks the maximum extended benefits which may be paid. Title II of the "Emergency Jobs and Unemployment Assistance Act of 1974," Act of Dec. 31, 1974, Pub. L. No. 93-567 established a federal program of assistance to those workers not otherwise eligible for unemployment assistance under state law. The "Unemployment

Compensation Amendments of 1976" mandate that the state laws include, effective January 1, 1978, coverage for certain farmworkers, most state and local government employees, individuals employed by elementary and secondary school systems and certain domestic workers.

The comprehensive federal legislation described above is illustrative of congressional intent to pre-empt the state, particularly with respect to the scope of inclusiveness in the unemployment program. Such would certainly tend to weaken the argument advanced by appellant and *amici curiae* (*e.g.*, Brief of Appellant at pp. 28-31 and Brief for the Chamber of Commerce as *amicus curiae*, p. 12) that the powers of the states are unimpaired in the area of the scope of coverages. This is not to suggest that there is any validity to such an argument since, obviously, the powers of the states are controlled by an overriding federal purpose. *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819); *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896).

That unemployment without fault on the part of the claimant was the social evil Congress sought to remedy can be gleaned from the appellant's brief wherein he states, quoting Senator Russell Long: "the *theory of unemployment benefits is that they provide income on a temporary basis to the worker who has become involuntarily unemployed . . .*" (Appellant's Brief, at p. 20) (Emphasis supplied by the appellant!) Moreover, the Brief for the Chamber of Commerce as *amicus curiae*, though filed in support of the appellant, nevertheless states that "there may exist equitable grounds" to distinguish between strikers and workers laid off due to a strike, admitting, therefore, that "equities" exist to treat these non-strikers differently than strikers and to permit states to grant these

non-strikers unemployment benefits. (Brief for the Chamber, at pp. 12-13) The "equities" discussed by the Chamber of Commerce which "permit" states to grant benefits to those idled by a labor dispute lie at the very heart of the congressional purpose for unemployment compensation. The states which have accepted this "equitable permission" now total 49 (See discussion *infra*, at Part C). Appellee would suggest, moreover, that the "equity which permits" the payment of benefits to those who are involuntarily unemployed is really the congressional purpose of unemployment compensation which mandates the payment.

The labor dispute disqualification imposed on workers laid off because of strikes in which they had no involvement has been successfully attacked as a contravention of legislative intent in at least two states. The Alabama labor dispute disqualification has been interpreted as to not deny benefits to an employee who becomes involuntarily unemployed by reason of a labor dispute in which he was in no way involved, and which he, his agents or organization were powerless to prevent. The Alabama court interpreted the statute in light of the general legislative purpose of providing benefits to persons who become unemployed involuntarily (*Department of Industrial Relations v. Drummond*, 30 Ala. App. 78, 1 So.2d 395, 398 (1940); *cert. den.* by Alabama Supreme Court, 241 Ala. 142, 1 So.2d 402 (1940); see also *Ex Parte McCleney*, 286 Ala. 288, 239 So.2d 311, 314 (1970)). The Supreme Court of Delaware, relying on the legislative purpose of providing benefits to persons unemployed without fault of their own, has held the labor dispute disqualification in that state applicable only to individuals who are participating in the dispute, with even a direct interest in the outcome of the dispute being insufficient to disqualify (*Lowe Bros., Inc. v. Unemp. Ins. App. Bd.*,

332 A.2d 150, 153 (Del. 1975)). In both of the above situations, neither state statute contained any of the so-called escape clauses. Moreover, although neither statute was as onerous in its terms as the Ohio disqualification, they were nevertheless determined to be violative of legislative intent.

The purpose of a labor dispute disqualification from receipt of unemployment compensation benefits has been discussed in a number of legal periodical articles. The justification of such legislation is generally based on two grounds. The first of these is that an employee involved in a labor dispute is not involuntarily unemployed, and denial of benefits under such circumstances is required to fulfill the basic purposes of limiting payment of benefits to those persons unemployed without fault of their own. The second justification or supporting argument is that a labor dispute disqualification is necessary to keep the state "neutral" in labor controversies; as, in the absence of such a disqualification: (1) the state would be financing or subsidizing, and possibly prolonging the dispute, by paying benefits to employees who were involved in the dispute or who had a direct interest in the outcome of the dispute; and (2) the state would be compelling the employer, whose contributions finance the compensation system, to subsidize the parties opposing him in a labor dispute. (See *Unemployment Compensation in Labor Disputes*, 49 Yale L.J. 461, 463-464 (1940); *Labor Dispute Disqualification under the Ohio Unemployment Compensation Act*, 10 O.S.L.J. 238, 239-240 (1949); *The Purposes and Provisions of the "Labor Dispute" Disqualification from Unemployment Compensation*, 56 Northwestern U.S. Rev. 662, 663-664 (1961); *Effect of Participation in a Labor Dispute upon Continuation of Unemployment Compensation*, 52 Cornell L.Q. 738, 749-750 (1967).)

Appellant and *amici curiae* argue that the State of Ohio, in disqualifying workers laid off because of a labor dispute, is merely preserving a position of neutrality in labor controversies. The disadvantages of taxation (for the payment of benefits to workers involuntarily unemployed) which are incurred by employers large enough to have separate establishments within, or totally foreign to the industry in which said workers are employed, e.g., multinational, vertically integrated firms such as United States Steel and Republic Steel Corporations, are far outweighed by the very purpose of unemployment compensation. Neutrality cannot be asserted to support industrial aggrandizement. Payment of compensation to individuals who are in no way participating in, financing or directly interested in a labor dispute, can in no sense be reasonably construed as subsidizing parties on one side of the dispute. Such payment, also, can in no sense be reasonably construed as compelling the employer to subsidize the parties who are opposing him in a labor dispute. In fact, Section 4141.29(D)(1)(a), rather than preserving the neutrality of the state in labor disputes, operates to violate the principle of neutrality. Denial of benefits to individuals in no way participating in, financing or directly interested in a labor dispute, would have the effect of influencing the disqualified individuals to take the employer's side in the dispute, since the continuation of the dispute would cause the individuals to *lose* both their regular wages and unemployment compensation benefits, as the result of a controversy from which they would *gain* absolutely nothing. Assertions of legislative purpose need not be taken at face value where, as in this case, an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been the goal of the legislation. (See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 fn. 16 (1975).) In

dealing with a class of necessitous workers claiming the benefits of broadly remedial legislation any ambiguities regarding congressional purpose ought to be resolved with liberality toward those for whom the benefit was created. *Voris v. Eikel*, 346 U.S. 328, 333-334 (1953).

Former Section 4141.29(D)(1)(a), Ohio Revised Code, cannot be harmonized with the recognized purposes of a labor dispute disqualification. The statute on its face requires denial of benefits to any individual unemployed by reason of a labor dispute at premises owned or operated by his employer anywhere in the United States, regardless of whether the individual or persons representing his interest are participating in the dispute. This overbroad disqualification is clearly not required to serve the purpose of limiting benefits to persons who become unemployed without fault of their own. The statute on its face also requires disqualification regardless of whether the disqualified individual or persons representing him are financing or directly interested in the dispute. This overbroad disqualification is clearly not required to keep the state "neutral" in labor controversies. Assuming, *arguendo*, that Section 4141.29(D)(1)(a) was not facially infirm on the ground that it could possibly be applied under appropriate circumstances in conformity with the recognized purposes of a labor dispute disqualification, the facts in this case show that its application to appellee and others similarly situated indisputably failed to conform with those purposes. Appellee and his fellow Ohio steelworkers were denied benefits because of a nationwide strike by the United Mineworkers affecting, in Ohio, U.S. Steel and the Republic Steel Corporation. Appellee, and the others similarly situated, were in no way participating in, financing or directly interested in the dispute which was used by the appellant as justification for denial of unemployment compensation benefits.

The payment of substantial federal funds for the administration of the unemployment program in Ohio, as well as the substantial credits allowed to Ohio employers under the Federal Unemployment Tax Act, mandate compliance with federal requirements. Mr. Justice Douglas, in his concurring opinion in *Rosado v. Wyman*, 397 U.S. 397, 427 (1970) analogizes to the federal-state unemployment system and succinctly states:

> The duty of a State, which receives this federal bounty to comply with the conditions imposed by Congress was averted to by Mr. Justice Cardozo who wrote for the Court in *Steward Machine Co. v. Davis*, 301 U.S. 548, 597-598, sustaining the constitutionality of the Social Security Act: "Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received." As he also said, speaking for the Court in *Helvering v. Davis*, 301 U.S. 619, 645, a companion case to *Steward Machine Co.*: "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states."

It is an interesting juxtaposition of *Steward Machine Co.* cited by the appellant and *amici curiae* in support of their position, that its authority should now be urged by the state and employers to support a system of underinclusiveness that was the very subject of the original attack on the federal-state unemployment program. The manifest purpose of the Social Security Act to promote the general welfare by providing unemployment assistance was used by that Court to

sustain the Act. *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-587 (1937).

The above discussion fully demonstrates that Ohio Revised Code, Section 4141.29(D)(1)(a), both on its face, and as applied (a) contravenes the controlling federal purpose of unemployment compensation legislation to provide benefits to persons unemployed without fault of their own, and (2) contravenes the controlling federally-articulated limitation that a labor dispute disqualification is only appropriate where applied to individuals who are in some significant way participating in, financing, or directly interested in the dispute. The suspect statute clearly violates the controlling federal requirement that *proper* methods of administration be adopted by state systems (42 U.S.C. Sec. 503(a); and, that such methods be *reasonably* calculated to insure full payment of unemployment compensation when due (42 U.S.C. Sec. 503(a)(1)).

Consequently, in this case, as in the *Java* case, cited and discussed above, we have a state statute which conflicts with the federal statutory scheme governing unemployment compensation. And, in this case, as in the *Java* case, the state statute is invalid under the Supremacy Clause of the Constitution of the United States.

B.

A DISQUALIFICATION FROM RECEIPT OF UNEMPLOYMENT COMPENSATION BENEFITS IMPOSED BY STATE LAW WHICH BY ITS TERMS OR IN ITS APPLICATION INFRINGES ON THE GUARANTEES OF EQUAL PROTECTION AND DUE PROCESS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IS NO LESS SUSCEPTIBLE TO JUDICIAL INVALIDATION THAN ANY OTHER CONSTITUTIONALLY INFIRM LEGISLATION.

The appellant and *amici curiae* have offered extensive discussion and citation of legal authority concerning the wide latitude given to states in framing disqualifications under their unemployment compensation laws. Appellee recognizes the existence of some grant of latitude, but, as demonstrated in Part A of this brief, this latitude is circumscribed by limitations imposed under the Supremacy Clause of the Constitution of the United States. This latitude is also clearly circumscribed by the guarantees of equal protection and due process contained in the Fourteenth Amendment to the Constitution of the United States. The decision of the District Court below was by no means novel in striking down, on due process and equal protection grounds, the former Ohio labor dispute disqualification as applied to appellee and others similarly situated. During the period of the past fourteen years, state-imposed disqualifications from receipt of unemployment compensation benefits, in their terms or application, have been found invalid under Fourteenth Amendment equal protection and due process in over a dozen cases, by both state and federal courts.

This Court, only last term and without finding it necessary to grant plenary consideration, struck down the Utah unemployment compensation pregnancy disqualification on the ground that it created an insupportable conclusive presumption in violation of Fourteenth Amendment due process (*Turner v. Dept. of Employment Security*, 423 U.S. 44 (1975)). Over thirteen years ago, this Court found that the South Carolina disqualification for failure to accept suitable work was unconstitutionally applied to a claimant who refused to work on Saturday because of religious scruples, the Court determining that the application of the statute violated claimant's First Amendment right to the free exercise of religion, secure against state action through the Fourteenth Amendment (*Sherbert v. Verner*, 374 U.S. 398 (1963); see also, relying on the *Verner* case, *Lincoln v. True*, 408 F. Supp. 22. (W.D. Ky. 1975), finding the Kentucky disqualification for quitting a job without just cause could not constitutionally be applied to a claimant who terminated her employment for religious reasons. The *underinclusiveness* of the Connecticut unemployment compensation statute designating dependents has been found to infringe upon Fourteenth Amendment equal protection (*Vacarrella v. Fusari*, 365 F. Supp. 1164 (D. Conn. 1973)). Rhode Island's former unemployment compensation statute, which placed a greater burden on female than male claimants in establishing the right to benefit increments based on dependency, was found violative of the Fourteenth Amendment right to equal protection (*Bowen v. Hackett*, 361 F. Supp. 854 (D. R.I. 1973)).

Among the decisions of state courts, the Supreme Court of Colorado most recently determined that the pregnancy disqualification in the unemployment compensation law of that state violated Fourteenth Amendment due process, relying on the *Turner* case,

supra, (*Sylvara v. Industrial Comm'n*, ____ Colo. ____, 550 P.2d 868 (1976)). Previously, the Supreme Court of Washington had invalidated the unemployment compensation pregnancy disqualification of that state on Fourteenth Amendment equal protection grounds (*Hanson v. Hutt*, 83 Wash. 2d 195, 517 P.2d 599 (1974)). The Supreme Court of Colorado struck down, on Fourteenth Amendment equal protection grounds, a provision of the unemployment compensation law of that state concerning the circumstances under which an employee might escape disqualification where he voluntarily leaves one job in order to take a "better job" (*Spann v. Industrial Comm'n*, 181 Colo. 153, 508 P.2d 385 (1973)). The equal protection guarantee of the Fourteenth Amendment also provided the basis for invalidating, in its discriminatory application to women, the disqualification in the California unemployment compensation law relating to leaving one's job because of marital or domestic duties (*Boren v. Calif. Dept. of Emp. Div.*, 59 Cal. App.3d 254, 130 Cal. Rptr. 683 (1976)). In addition to the above generally reported cases, state unemployment compensation disqualification provisions have been ruled unconstitutional in application in the following unofficially reported cases: (*Lasko v. Garnes*, 1A Unempl. Ins. Rep., Oct. 1966-Dec. 1974 Transfer Binder–Unemployment Insurance New Matters Para. 21,421 (N.D. Ohio 1973), finding Ohio pregnancy disqualification unconstitutional as applied to women involuntarily discharged because of pregnancy; *Meckler v. Haberfield*, 1B Unempl. Ins. Rep., Ohio–New Matters Para. 8943 (Ohio Com. Pl. 1975), following the *Lasko* case; *Jordan v. Fusari*, 1A Unempl. Ins. Rep., Oct. 1966-Dec. 1974 Transfer Binder–Unemployment Insurance New Matters Para. 21,420 (D. Conn. 1973), consent decree enjoining enforcement of former Connecticut pregnancy disqualification as violative of the Fourteenth Amendment, *remanded* for

further consideration of the issue of attorneys' fees, 496 F.2d 646 (2d Cir. 1974); *Stickel v. Mason*, 1A Unempl. Ins. Rep., Oct. 1966-Dec. 1974 Transfer Binder–Unemployment Insurance New Matters Para. 21,415 (D. Md. 1973), consent decree enjoining enforcement of Maryland pregnancy disqualification as violative of Fourteenth Amendment).

The type of statute most frequently involved in the above cases is a pregnancy disqualification, which bears striking similarities to the type of disqualification involved in the instant case. The pregnancy disqualifications were clearly designed to reach situations in which benefits should properly be denied under unemployment compensation statutes, and to prevent unemployment compensation from becoming a form of disability insurance for pregnant women. Clearly, a woman who voluntarily leaves her employment because of pregnancy, while quite capable of continuing to work, should not receive benefits on the ground that her unemployment is voluntary. Also, a woman who is discharged by her employer, after her pregnancy reaches a stage which interferes with her ability to perform her job duties, should be denied benefits on the ground that she is not a physically able member of the work force. The vice of these pregnancy disqualifications was that they overreached in their application, and invariably imposed disqualification on women who were ready, willing and able members of the work force. Typical of these situations is where a pregnant woman is discharged by her employer, on the ground of her pregnancy, at a time when she is physically able, and ready and willing to continue work. Similarly, we have the statutes which overreach in their facial provisions, in imposing insupportable conclusive presumptions of inability of pregnant women to work after reaching a certain stage of pregnancy.

Like the pregnancy disqualifications found violative of Fourteenth Amendment due process and equal protection, facially or in application, the former Ohio labor dispute disqualification was designed to cover certain situations in which benefits should properly be denied. There are situations where the neutrality of the state in labor disputes would be violated by payment of benefits, or where payment would tend to prolong the dispute, creating a dangerous risk to the solvency of the unemployment compensation fund. However, the former Ohio statute manifestly overreached in some applications, and operated to disqualify individuals whose eligibility for benefits was otherwise indistinguishable from that of other claimants, and without regard to whether disqualification was required to protect the neutrality of the state or the solvency of the unemployment compensation fund. Just as surely as the pregnancy disqualifications were properly struck down where they overreached permissible state objectives, the court below properly struck down the former Ohio labor dispute disqualification, on equal protection and due process grounds, where it overreached permissible state objectives in its application to appellee and others similarly situated.

Appellant, in support of the constitutionality of the former Ohio statute, offers the general proposition that a state does not violate the equal protection clause because the classifications made by its laws are imperfect, and if the classification has some "reasonable basis", it does not offend the Constitution because it is not made with mathematical nicety or in practice it results in some inequality (Brief of Appellant, p. 11). We do not dispute the general validity of this proposition, but it cannot be read to permit states to adopt crude formulae which equate persons whose situations are manifestly different, while dispensing

unequal treatment to persons whose circumstances are rationally indistinguishable. The word "equal" cannot be stripped from the equal protection clause by any broad proposition of law.

Appellant also urges that a statutory program will survive a constitutional attack if any state of facts can be adduced to provide a "rational basis" for the legislative judgment (Brief of Appellant, p. 11). We again have a generally sound proposition, when applied to determination of the facial constitutionality of legislation. However, if this proposition were literally invoked in deciding all constitutional controversies, no facially constitutional statute could ever be found violative of the Constitution in its application to a particular individual or class of persons affected. An infinite number of states of fact can be adduced to provide a rational basis for South Carolina's disqualification for refusal to accept suitable employment, applied to the claimant in the *Verner* case, *supra*, but the facial validity of that statute provided no arguable barrier to its application to the particular claimant being adjudged unconstitutional by this Court. The District Court below determined that the former Ohio labor dispute disqualification was unconstitutional as applied to appellee and the members of his class (408 F. Supp., at 1022). The fact that application of the statute to strikers, for example, would have a rational basis, did not require that the statute "survive a constitutional attack" as applied to appellee and others similarly situated.

The above discussion demonstrates that disqualifications contained in state unemployment compensation laws are no more immune to proper constitutional attacks than any other form of legislation, and that the decision of the court below did not deviate from any established principles of constitutional adjudication.

C.

THE FORMER OHIO LABOR DISPUTE DISQUALIFICATION, AS APPLIED TO APPELLEE AND OTHERS SIMILARLY SITUATED, VIOLATED THE FOURTEENTH AMENDMENT GUARANTEE OF EQUAL PROTECTION OF THE LAWS.

1. The nature of the discrimination imposed by former O.R.C. Sec. 4141.29(D)(1)(a).

The Ohio unemployment compensation laws provide benefits to a broad general class of persons who become unemployed without fault of their own. This broad class is circumscribed by certain excluded employments enumerated in Section 4141.01 of the Revised Code. Exclusions of this nature were extensively discussed by this Court in *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937), and their justification adequately covered in this Court's discussion (301 U.S., at 510-513). (The determination of Congress that many of these exclusions are no longer justified is discussed in Part (A), above in this brief.) Appellee and his fellows, of course, being employees of gigantic steel manufacturing enterprises, were not in any of the excluded categories. No argument can be made that the steel industry is similar to agriculture, shipping, a small family business, an employer of domestic servants, a religious or charitable enterprise, the sovereign government of the United States, or a state and its political subdivisions. All employees in Ohio, other than those in the specifically excluded employments, belong to the general class of beneficiaries entitled to the protection of the unemployment compensation law, provided the additional requirement is met of having worked in employment covered by the unemployment compensation law during at least twenty calendar weeks in a

statutorily defined "base period", and having received a specified minimum amount in earnings (O.R.C., Sec. 4141.01(R)). There has been no dispute in this case that appellee and his fellows met the above requirements, and therefore were within the general class of beneficiaries covered under the Ohio unemployment compensation law.

The right to benefits of individual members of the general class of statutory beneficiaries is principally governed by Section 4141.29 of the Revised Code (App., pp. 26-33). This statute provides that each eligible individual shall receive benefits for loss of remuneration due to total or partial involuntary unemployment, subject to the conditions stipulated in the unemployment compensation law, and the statute then specifies several conditions of qualification and disqualification. The conditions of qualification are contained in divisions (A) through (C) of Section 4141.29, and include the requirement of filing a valid application and claim for benefits (divs. (A)(1) and (A)(2)), registration at an employment office (div. (A)(3)), physical ability to work (div. (A)(4)), availability for, and active seeking of suitable work (div. (A)(4)), inability to obtain suitable work (div. (A)(5)), and the requirement of a one-week waiting period (divs. (B) and (C)). The provisions *disqualifying* otherwise eligible individuals are contained in division (D) of Section 4141.29. Disqualification is imposed (1) where unemployment is due to a labor dispute at any premises owned or operated by the claimant's employer within the State of Ohio or any other state of the United States (div. (D)(1)(a)); (2) where the employee has been given a disciplinary layoff for misconduct in connection with his work (div. (D)(1)(b)); (3) for quitting work without just cause (div. (D)(2)(a)); (4) for discharge for just cause in connection with work (div. (D)(2)(a)); (5)

for refusal without good cause to accept suitable employment (div. (D)(2)(b)); (6) for failure to investigate a referral to suitable work (div. (D)(2)(b)); (7) for quitting work to marry, or because of marital, parental, filial or domestic obligations (div. (D)(2)(c)); (8) where the individual became unemployed because of pregnancy (div. (D)(2)(c)); (9) for making a false statement or the like with the object of obtaining unemployment compensation benefits to which not entitled (div. (D)(2)(d)); (10) where the individual became unemployed by reason of commitment to a penal institution (div. (D)(2)(e)); and (11) where the individual became unemployed due to dishonesty in connection with his work (div. (D)(2)(f)).

Each of the above eleven indentifiable disqualifications is founded on some act or omission of the disqualified individual which bears an implication of fault, with the exception of the labor dispute and the pregnancy disqualifications. For this reason, the latter two disqualifications discriminate between the individuals subjected to them, and all the other beneficiaries under the Ohio unemployment compensation law who are disqualified only for some act or omission bearing an implication of individual fault. The discrimination imposed by the pregnancy disqualification was found to be invidious in the constitutional sense, as applied to women involutarily discharged by their employers, and this application of that statutory provision has been permanently enjoined (*Lasko v. Garnes*, 1A Unempl. Ins. Rep., Oct. 1966-Dec. 1974 Transfer Binder–Unemployment Insurance New Matters Para. 21,421 (N.D. Ohio 1973)). The discrimination imposed by the former labor dispute disqualification was likewise found unconstitutional by the District Court below, as applied to appellee and others similarly situated, and that application was permanently enjoined. The correctness of this decision is fully discussed below.

2. The appropriate "equal protection" standard.

Appellee recognizes the evolvement of a "two-tier" approach in the adjudication of equal protection questions, and does not urge that the interests involved in this case subject the state's action to "strict scrutiny". The challenged legislation must be tested under the "rational basis" approach. It must candidly be observed that literal application of the less rigorous standard would make all legislation, not subject to strict scrutiny, immune from equal protection attacks, and effectively remove that clause from the Fourteenth Amendment except where "suspect classifications" or "fundamental rights" are involved. For no legislation could literally be found to be "irrational" unless it were clearly the product of moon-struck madmen, acting in legislative concert while benefit of their senses. This Court has not, without a more probing analysis, literally imposed the rationality test in cases which do not involve suspect classifications or fundamental rights (*Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *cf., Massachusetts Bd. of Retirement v. Murgia*, ____ U.S. ____, 49 L.Ed.2d 520 (1976) (dissenting opinion of Marshall, J., 49 L.Ed.2d, at 527-529). In evaluating the standards of equal protection, in a case not requiring strict scrutiny, Mr. Chief Justice Burger observed in part in *Reed v. Reed, supra*:

> "... The Equal Protection Clause ... does ... deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, and not arbitrary, and must rest on some ground of difference having a fair and substantial relation to

the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' . . ." (404 U.S., at 75-76.)

The legislation challenged in the instant case, as applied to appellee and others similarly situated, clearly failed to meet the above-articulated standards.

3. The history and provisions of labor dispute disqualifications from receipt of unemployment compensation benefits.

The unemployment compensation statutes of all the jurisdictions of the United States have contained "labor dispute" disqualifications since their inception. The most widely-adopted provision is one which disqualifies an individual when his unemployment is due to a labor dispute at the factory, establishment or other premises where he is or was last employed, with a proviso to protect individuals who are not actually, or by reasonable imputation, involved or directly interested in the dispute. These "escape clause" or "innocent bystander" provisions typically permit the individual to escape disqualification if it is shown that neither he, nor any employees of the same grade or class, are participating in, financing, or directly interested in the dispute. (See Fierst and Spector, *Unemployment Compensation in Labor Disputes*, 49 Yale L.J. 461 (1940), at 461-462 n4.) An employee is considered to be "directly interested" in a dispute within the meaning of these statutes if his wages, hours, or conditions of employment will be affected by the outcome of the dispute. (See generally, *Annese v. Bd. of Rev. of Dept. of Emp. Sec.*, 105 R.I. 32, 249 A.2d 46, 47 (1969); *Graham v. Sanders*, 11 Mich. App. 361, 161 N.W.2d

601, 609 (1968); *Burak v. American Smelting and Refining Co.*, 134 Colo. 255, 302 P.2d 182, 184 (1956); *Martineau v. Director of Div. of Emp. Sec.*, 329 Mass. 44, 106 N.E.2d 420, 424 (1952).) The widely-adopted statutory provision was the one recommended for adoption by the states by the federal Social Security Board at the inception of unemployment compensation law in the United States, and was derived from the law of Great Britain, as amended in 1924. (See Fierst and Spector, *supra*; see, as to the 1924 amendment to the British law, Haggart, *Unemployment Compensation during Labor Disputes*, 37 Neb. L. Rev. 668, 686 (1958).) This typical statute is the present law in forty-three of the fifty-two jurisdictions of the United States, with the variation that thirteen of the forty-three do not disqualify on the ground of financing the dispute (Table 405, columns (8) through (10), App., p. 35). This typical form of legislation was adopted by forty-one of fifty-one jurisdictions of the United States at the earliest stages of unemployment compensation law in this country (Fierst and Spector, *supra*, 49 Yale L.J. 461).

The nine jurisdictions which do not currently have the typical disqualification are Alabama, California, Delaware, Kentucky, New York, North Carolina, Ohio, Utah and Wisconsin. The relevant California statute clearly limits its disqualification to individuals who have *voluntarily left* their employment because of a trade dispute (Cal. Unemp. Ins. Code, Sec. 1262). An individual is disqualified in Utah only where his unemployment is due to a strike involving his grade, class or group of workers at the factory or establishment where he is or was last employed (Utah Code Ann., Sec. 35-4-5(d)). Four jurisdictions, Alabama, Delaware, Kentucky and Wisconsin, have disqualifications which substantially follow the British law as it

existed prior to 1924. The disqualification is imposed only where the dispute is at the factory, establishment or other premises where the individual is or was last employed (Ala: Code of Ala., Tit. 26, Sec. 214(A); Del: Del. Code Ann., Tit. 19, Sec. 3315(4); Ky: K.R.S., Sec. 341.360(1); Wis: W.S.A., Sec. 108.04(10)). The New York statute provides disqualification from benefits for a limited period of seven weeks, but in other respects is substantially similar to the Alabama, Delaware, Kentucky and Wisconsin laws (Consol. Laws of New York, Labor Law, Sec. 592). The Alabama statute, from its earliest days, has been interpreted as not disqualifying an individual who becomes involutarily unemployed by reason of a labor dispute in which he is in no way involved, and which he, his agents, or organization were powerless to prevent. (See *Drummond v. Department of Industrial Relations*, 30 Ala. App. 78, 1 So.2d 395, 398, *cert. denied* 241 Ala. 142, 1 So.2d 402 (1940); see Part (E), below in this brief, for further discussion of Alabama law, and of appellant's thoroughly bewildering view of the law of that state.) The Supreme Court of Delaware has quite recently held that the labor dispute disqualification in that state is applicable only to those participating in the dispute, with even a direct interest in the outcome being insufficient to disqualify (*Lowe Bros., Inc. v. Unemp. Ins. App. Bd.*, 332 A.2d 150, 153 (Del. 1975). The courts of Alabama and Delaware, in reaching their interpretations, both relied on the overriding purpose of unemployment compensation statutes to aid those involuntarily unemployed through no fault of their own.

The Kentucky, New York, and Wisconsin statutes have not been interpreted as exempting individuals who are in no way involved or directly interested in a labor dispute. (A petition for writ of certiorari is pending

before this Court, Case No. 75-1644, for review of a recent interpretation of the New York statute in *Drassenower v. Levine*, 48 A.D.2d 957, 369 N.Y.S.2d 227 (1975), *mot. to dismiss appeal granted*, 38 N.Y.2d 771 (1976).) However, the courts of these three states have rejected imposition of a disqualification where the dispute is at premises distinctly separate from the claimant's place of employment. (See, Ky: *United States Steel Corp. v. Brown*, 441 S.W.2d 205 (Ky, 1969), determining that a coal processing plant and mining operations, ninety miles apart and within the state, did not constitute a single establishme. , *Ford Motor Co. v. Kentucky Unemp. Comp. Comm'n*, 243 S.W.2d 657 (Ky. 1951), holding that automobile assembly plants in Kentucky and assembly plants in Michigan did not constitute the same establishment; New York: *Farina v. General Motors Corp.*, 41 A.D.2d 98, 341 N.Y.S.2d 460 (1973), *mot. for leave to appeal denied, sub. nom. Farina v. Levine*, 32 N.Y.2d 612, 346 N.Y.S.2d 1026 (1973), determining that employees of a particular automobile plant, not on strike, were not disqualified from unemployment compensation benefits when production was curtailed due to a strike at assembly plants operated by their employer at other locations; Wis: *Abendroth v. Dept. of I., L., & H. Rel.*, 69 Wis.2d 736, 233 N.W.2d 343 (1975), determining that airline ground employees laid off at terminals in Madison and Milwaukee, because of a strike of pilots at Minneapolis and Seattle, were not disqualified from receipt of unemployment compensation benefits; *Liberty Trucking v. Department of Industry, etc.*, 57 Wis.2d 331, 204 N.W.2d 457 (1973), holding that trucking terminals in Chicago and in Wisconsin were not one establishment so as to impose disqualification on individuals employed at the Wisconsin terminals; *Schaeffer v. Industrial Comm'n*, 11 Wis.2d 358, 105

N.W.2d 762 (1960), holding pulp producing plant and paper mills, eighty miles apart, did not constitute a single establishment; in the *Abendroth, Liberty Trucking* and *Schaeffer* cases, the Supreme Court of Wisconsin carefully distinguished and severely limited the vitality of its early unemployment compensation decision in *Spielmann v. Industrial Comm'n*, 236 Wis. 240, 295 N.W. 1 (1940).) The pre-1963 Ohio labor dispute disqualification was quite similar to the Kentucky and Wisconsin statutes, but it also was interpreted as non-disqualifying where the dispute was a premises distinctly separate from the place of employment of the claimants for benefits. (See *Abnie v. Ford Motor Co.*, 175 Ohio St. 273, 194 N.E.2d 136 (1963), finding that automobile plants in Ohio and a plant in Michigan were not one establishment.)

The above analysis of labor dispute disqualifications in Great Britain and the United States establishes that disqualification was never imposed, in any of the jurisdictions discussed, where the dispute was at premises distinctly separate from the place of employment of the individual seeking benefits. The analysis also shows that in the overwhelming majority of jurisdictions (Great Britain and forty-seven American jurisdictions), no disqualification is imposed unless there is some actual, or rationally imputable, involvement or interest in the dispute on the part of the individual seeking benefits. It was not until the year 1961, decades after unemployment compensation schemes were first adopted, that legislation was enacted in North Carolina which disqualified an individual regardless of the geographical remoteness of the location of the dispute, and regardless of any arguable actual, or imputable, participation or direct interest in the dispute on the part of the disqualified person (Gen. Stat. N.C., Sec. 96.14(5)). This unprecedented, dubious and drastic

course was then imitated by Ohio with the 1963 enactment of the statute in issue in this case (1963 Ohio Laws, 130:972, 974), with Ohio retreating from this extreme position in 1975. (See O.R.C., Sec. 4141.29(D)(1)(a)(Page's 1975 Supp.); see also the opinion of the District Court below, 408 F.Supp., at 1018.)

4. The former Ohio labor dispute disqualification, as applied to appellee and others similarly situated, was not rationally related to the furtherance of a legitimate state interest.

a. The "neutrality" argument.

Appellee will accept, for purposes of simplification, that the principal state justifications for labor dispute disqualifications are (1) the preservation of state neutrality in labor disputes, (2) protection of the fiscal integrity of unemployment compensation trust funds, and (3) the volutary character of the unemployment of persons participating in a labor dispute. (See, for exposition of these purposes in varying degrees of detail, Fierst and Spector, *Unemployment Compensation in Labor Disputes*, 49 Yale L.J. 461, 463-464 (1940); Lesser, *Labor Disputes and Unemployment Compensation*, 55 Yale L.J. 167, 171-177 (1945); Comment, *Labor Dispute Disqualification under the Ohio Unemployment Compensation Act*, 10 Ohio St. L.J. 238, 239-240 (1949); Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. Chi. L. Rev. 294, 296-300 (1950); Comment, *The Purposes and Provisions of the Labor Dispute Disqualification from Unemployment Compensation*, 56 Northwestern U. L. Rev. 662, 663-664 (1961); Note, *Effect of Participation in Labor Dispute upon Continuation of Unemployment Benefits*, 52 Cornell L.Q. 738, 749-750

(1967).) We will not pause to discuss the third of the above-stated objectives, since the rationality of its basis is obvious. With regard to the neutrality argument, it should be articulated in more detail. This argument essentially involves avoidance by the state of compelling the employer to subsidize those who are opposing him in a labor dispute, or who would clearly stand to benefit by resolution of the dispute favorably to the participating employees. This subsidization, in addition to its inherent unfairness, would also put the employer at a disadvantage in negotiating a settlement of the dispute.

The labor dispute disqualifications in the form employed in Great Britain since 1924, and in forty-seven of the fifty-two jurisdictions of the United States, by their clear statutory language or through court interpretation, rationally further the state's interest in neutrality. Disqualification in these jurisdictions is not imposed where there is no actual, or reasonably imputable involvement or direct interest in the dispute on the part of the claimant for benefits. Where a disqualification goes beyond these limits, it overreaches the bounds of neutrality, and becomes a punitive sanction exacted at the expense of innocent parties.

> "... Blanket disqualification would affect many whose unemployment was unquestionably involuntary; *it would abandon the state's neutral position and assume a punitive aspect as to employees not involved in the dispute*; it would preclude payment of compensation that in no way could be termed 'strike benefits.'" (Emphasis added.) (Shadur, *Unemployment Benefits and the "Labor Dispute Disqualification*, 17 U. Chi. L. Rev. 294, 324 (1950))

Also a blanket disqualification cannot be termed "neutral" since it tends to deter workers with legitimate

grievances from striking for fear of the suffering which might be imposed on innocent, disinterested fellow employees; and a blanket disqualification tends to punish innocent employees because their fellows had decided to exercise their federally-guaranteed right to engage in collective bargainning. (See Shadur, *supra*, 17 U. Chi. L. Rev., at 297-298.)

With regard to application of the former Ohio labor dispute disqualification being justified in the instant case to prevent subsidization of a labor dispute, the District Court below quite correctly observed:

> "... However, the denial of benefits to plaintiff and the class herein in no way served the State's interest in seeking to avoid subsidization of the coal miners' strike. Nor is it logical to conclude that payments of benefits to the *Steelworkers* would have placed U.S. Steel or Republic Steel at an unfair disadvantage in negotiations with the *coal miners' union*...." (408 F.Supp., at 1022. Emphasis by the Court.)

Appellee firmly maintains that a labor dispute disqualification does not rationally further the state interest of neutrality where it reaches beyond the edge of a circle which encompasses those persons who actually, or by necessary imputation, are involved or directly interested in the dispute. The fundamental objective of all unemployment compensation legislation is to protect individuals who become unemployed through no fault of their own. A labor dispute disqualification which reaches individuals involuntarily unemployed without fault of their own, when not serving the interest of state neutrality, discriminates on the basis of criteria wholly unrelated to the purported objectives of the disqualification and the objectives of the unemployment compensation law. It also fails to rest on some ground of difference having some fair and substantial relation to the objectives of unemployment

compensation legislation. For these reasons, such a disqualification cannot pass equal protection muster even when tested by the less stringent "rationality" standard. (See *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).)

Appellee recognizes that the above analysis, beyond the question of the legislation in issue in the instant case, casts serious doubt on the Kentucky, New York and Wisconsin statutes in their application to persons in no way involved or directly interested in a labor dispute. The analysis was naturally intended to cast more than serious doubt as to the validity of the present North Carolina law. Appellee challenges these statutory schemes without trepidation. A statute without an "escape clause", but limited to disputes at the establishment or premises where the individual is or was employed, might have had rational justification in a less complicated era. At the early stages of unemployment compensation law, when establishments were generally smaller and less complex, it might have been argued that there was a very likely community of interest, or a clear possibility of collusion between the indentifiable participants in a labor dispute and purported nonparticipants. However, in modern industrial establishments, the existence of distinctive interests, the growing incidence of several different bargainning agents, and other relevant facts can readily be discerned through recognized evidentiary processes, which would not make it burdensome to determine which persons should be disqualified in the interest of preserving state neutrality. The inappropriateness of a blanket disqualification is so manifest to have been obvious to a law student in discussing the pre-1963 Ohio labor dispute disqualification which was substantially similar to the present Kentucky and Wisconsin statutes.

> "It is submitted that the present statute in Ohio is not in harmony with the vast weight of authority which allows benefits to be paid where the claimant has lost his employment involuntarily and without participation on his part in the dispute involved. It seems inconsistent with the spirit and purpose of unemployment laws in general, which is to protect the diligent worker from the dangers of unforeseeable and enforced unemployment." (Note, 24 Cinn. L. Rev. 401, 404 (1955))

This Court in the instant case, however, need not reach the question as to whether a blanket disqualification is rationally supportable where there is a labor dispute at the place of employment of a claimant for benefits. The former Ohio statute was applied in the instant case to disqualify appellee and his fellow steelworkers where the labor dispute was at distinctly separate and remote premises. As noted above, a blanket disqualification is rationally questionable as applied to wholly noninvolved and disinterested individuals, even where a dispute is at the place of employment of the persons seeking benefits. But, when such a disqualification is extended to clearly noninvolved and disinterested persons because of a dispute at distinctly remote premises, even the slightest thread of rationality is totally severed. Even arguments of possible collusion between the participants in the dispute, and the persons seeking unemployment compensation benefits, become frivolous and fanciful. This type of disqualification is nothing less than disqualification for the sake of disqualification.

The former Ohio statute, not being rationally related to furtherance of the neutrality of the state as applied to appellee and others similarly situated, quite predictably operated to produce inequitable and bizarre results. In the instant case, the steelworkers were laid off because a labor dispute had diminished the supply of

a necessary energy source used in manufacture of steel. Any steelworkers laid off because of the coal mine strike were entitled to unemployment compensation benefits under the former Ohio statute, except those workers whose employers also owned coal mines. It can be seen, then, that the former Ohio statute served to encourage and reward monopolistic acquisition, a questionable policy in the light of federal antitrust laws. The former Ohio statute, though part of a statutory scheme designed to alleviate the evil of involuntary unemployment, actually operated to encourage employers to impose unemployment on their Ohio employees. It is common knowledge that one of the principal employers in this case, United States Steel Corporation, has extensive steel manufacturing facilities in the states of Pennsylvania and Indiana, which border Ohio immediately to the East and to the West. Confronted with the loss of coal supplies, and the knowledge that any furloughed steelworkers in Pennsylvania or Indiana would be eligible for unemployment compensation benefits, the employer's clearly logical choice would have been to lay off its Ohio employees. *It is hardly rational for a state to include in its unemployment compensation laws a provision which would tend to encourage and reward employers for imposing unemployment on workers in that state.*

Appellant and *amici curiae*, in support of their neutrality argument, invoke a "domino theory" that all employees' interests are affected by every labor dispute, more specifically urging that a wage increase for one group of employees will invariably lead to increases for all. The facts of this case offer a perfect illustration of the fallacy of this assertion. Steel manufacturing and coal mining are vastly different activities, involving dissimilar hazards and working conditions, so that any purported relationship between the wage scales in the two industries is purely speculative and fanciful. The

"domino theory" also presupposes that all labor disputes involve economic issues. This completely ignores the fact that labor disputes quite commonly involve working conditions, health and safety issues, job qualifications and other noneconomic questions. It is obvious that questions of this sort will often only affect an identifiable and possibly small group of employees, and be of no interest to other employees, and bring no benefit to them.

Clinging to their last straw in support of the neutrality argument, appellant and *amici* urge that the prospect of being taxed in the future, for payment of benefits to noninvolved and disinterested employees laid off because of a labor dispute, will cause employers to crumble at the negotiating table, and yield to the most outrageous and unseemly demands of organized labor. The invalidity of this argument, and the havoc its acceptance would wreak on the unemployment compensation laws of fifty-one of the fifty-two jurisdictions of the United States, is discussed below in appellee's response to the "preemption" argument.

b. The "fiscal integrity" argument.

Appellee and amici urge that the former Ohio labor dispute disqualification was justified by the need to protect the fiscal integrity of the unemployment compensation fund. The fiscal integrity argument has some logical validity where payment of benefits to involved or interested persons is in issue, since payment might tend to encourage or prolong work stoppages, thereby creating an unacceptable risk of drainage of the unemployment compensation trust fund. There is some credible opinion that the soundness of this actuarial argument is questionable even with regard to payment of benefits to persons involved or directly interested in

a labor dispute. (See Lesser, *Labor Disputes and Unemployment Compensation*, 55 Yale L.J. 167, 176-177 (1945).) However, as applied to justify denial of benefits to wholly noninvolved and disinterested individuals, the "fiscal integrity" theory has no support in logic. Payment of benefits in those circumstances would in no way tend to encourage or prolong stoppages of work.

In the absence of any logical correlation between denial of benefits to noninvolved and disinterested employees, and the preservation of the fiscal integrity of unemployment compensation trust funds, the denial can only be justified under this theory by a factual showing that payment of benefits presents a special risk, distinguishable from the risks created by other forms of involuntary unemployment. Appellee has assuredly made no such showing. Using the figures supplied by appellant (Brief of Appellant, p. 16), Amicus Republic Steel Corporation (Amicus Brief of Republic Steel, p. 4), and Amicus United States Steel Corporation (Amicus Brief of U.S. Steel, p. 2), payment of benefits to appellee and others similarly situated would reduce the level of the Ohio unemployment compensation trust fund to something in excess of 237 million dollars. (Amici Republic and U.S. Steel, to their everlasting credit, have not asserted that the payments will drive them into bankruptcy.) With regard to the decision of the District Court below being precedent which might create an unacceptable risk of depletion of the Ohio unemployment compensation fund in the future, the Ohio legislature has clearly determined that such a risk is allowable by its 1975 amendment of the labor dispute disqualification (O.R.C., Sec. 4141.29(D)(1)(a) (Page's 1975 Supp.)).

The only purported factual material submitted in support of the fiscal integrity argument are some figures

concerning certain states borrowing from the federal government because of exhaustion of the unemployment funds in those jurisdictions (Brief of Appellant, pp. 15-16). Appellant, however, offers nothing to demonstrate a relationship between the exhaustion of these funds and the fact that the jurisdictions in question have labor dispute disqualifications less stringent than the former Ohio statute. Indeed, the existence of such a relationship is purely a matter of speculation. We further ask whether appellant has considered that exhaustion of these funds might be attributable to the fact that, over the past few years, this Nation has unfortunately suffered the highest levels, by far, of persistent overall unemployment since the Great Depression.

Appellant places great reliance on the decision of this Court in *Dandridge v. Williams*, 397 U.S. 471 (1970). The *Dandridge* case is clearly distinguishable from the one presently before the Court. *Dandridge* involved a regulation placing a maximum limit on grants to AFDC families, which resulted in a difference in the aid received per capita by larger families. The regulation in *Dandridge* did not *exclude* any eligible families from aid. In clear contrast, the former Ohio statute, without rational justification, completely excluded appellee and others similarly situated from receipt of any unemployment compensation benefits. The *Dandridge* case also involved distribution of *limited* public welfare funds among a myriad of potential recipients. By contrast, an unemployment compensation trust fund is not fixed and limited, but is kept solvent by taxation of employers at a rate determined by their unemployment experience. In this situation, exclusion of a particular group of involuntarily unemployed individuals, who work for an employer subject to the unemployment compensation tax, can only be justified by showing that the payment of benefits would result in excessive and

burdensome taxation of the employer. No such showing has been, or can be made in this case. Where there is no question of subsidization of a labor dispute, the risk of compensating those involuntarily unemployed because of the dispute is indistinguishable from compensating other forms of involuntary unemployment. And, where an indistinguishable risk is selected for exclusion, that exclusion is arbitrary, not rational.

Appellant's reliance on this Court's decision in *Gedulig v. Aiello*, 417 U.S. 484 (1974), is similarly misplaced. *Aiello* involved a state disability compensation system funded by a *uniform fixed premium* paid by deductions from employees' wages. The risk of pregnancy was not covered under the system, but pregnancy is a risk clearly distinguishable from the risks imposed by other forms of disability. In the instant case, we have a system which is funded by an *adjustable premium*, and the exclusion of a risk which is not rationally distinguishable other risks which are compensable under the unemployment compensation system. More informative than *Dandridge* or *Aiello*, in the adjudication of the instant case, is this Court's opinion in *Jimenez v. Weinberger*, 417 U.S. 628 (1974). This Court distinguished *Jimenez* from *Dandridge* by pointing out that no showing had been made in *Jimenez* that the payment of social security benefits to certain classes of illegitimate children would significantly impair the federal Social Security trust fund (417 U.S., at 633). Clearly, in the instant case, appellant has likewise failed to show any danger of impairment of the Ohio unemployment compensation trust fund by payment of benefits to appellee and others similarly situated.

Since the exclusion imposed by the former Ohio labor dispute disqualification, as applied to appellee and others similarly situated, was not rationally required to

protect the fiscal integrity of the unemployment compensation fund, its sole justification is as a form of *per se* tax relief to employers subject to the Ohio unemployment compensation law. While it might be an admirable objective for a state to grant tax relief to employers in order to attract industry and business, this relief cannot arbitrarily be granted in an unemployment compensation scheme. Arbitrary tax relief in an unemployment compensation law would certainly make employers happy, but it is destructive of the entire unemployment compensation system. An unemployment compensation system is designed to shift the burden of hardship created by involuntary unemployment from the employee to his employer, to relieve the employee's suffering, and to prevent to burden of providing for the employee's needs being placed on the general taxpaying public. Any disqualification from benefits tends to defeat these purposes. The employee must then suffer the full burden, or rely on state or federal public assistance, thereby shifting the burden from the employer to the taxpayers of the particular state and of the entire Nation. As distasteful as payment of taxes may be to employers, and to all of us, it has long been recognized that this expense can and will utlimately be absorbed in the prices of employer charges to consumers for his goods or services. (See *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 524-525 (1937).)

c. The "preemption" argument.

Appellant expressly (Brief of Appellant, p. 23), and *amici curiae* by implication, urge that denial of unemployment compensation benefits to wholly non-involved and disinterested individuals laid off due to a

labor dispute is necessary to avoid impairment, through state action, of the strength of employers at the bargainning table, and to thereby avoid intrusion into the area of national labor policy preempted by the federal government. This argument, while having some slight surface appeal, conceals its insidious implications. Beneath the surface, it presents the broad and bold assertion that payment of benefits under any circumstances to any individual unemployed because of a labor dispute at any premises owned or operated by his employer at any location, *violates the Supremacy Clause of the Constitution of the United States*. The appropriateness of payment of benefits to noninvolved and disinterested individuals, even where the dispute is at their place of employment, has been recognized for decades in Great Britain and the overwhelming majority of the jurisdictions of the United States. Even among the five (out of fifty-two) minority American jurisdictions, benefits will be paid in four of them where the dispute is at a location distinctly separate from the place of employment of the claimants for benefits. (See discussion under (3) above in this Part of this brief.) Acceptance of the argument of appellant and *amici curiae* would, on supremacy grounds, invalidate the labor dispute disqualifications in fifty-one of the fifty-two jurisdictions of the United States. In exchange for this overall, massive destruction of unemployment compensation statutes, one state scheme will be permitted to survive, that of North Carolina. Appellant is in fact attacking even the validity of the current Ohio law, and the Ohio law as it existed prior to 1963. This is the essence of the choice offered the Court by appellant in its zeal to justify Ohio's twelve-year ignoble experiment, and by *amici* in their zealous pursuit of the greatest possible tax relief for employers, at the expense of imposing suffering on their employees and shifting

tax burdens to the general public. The development of federal labor law and unemployment compensation law have essentially been parallel and contemporaneous. The consideration by Congress of British law in adopting the American system, the form of labor dispute disqualification recommended for state adoption by the federal Social Security Board at the earliest stages of American unemployment compensation law (see discussion under (3) above in this Part of this brief), and the silence of Congress for four decades with the presumed knowledge that only two American jurisdictions have ever attempted to deny unemployment compensation benefits to noninvolved and disinterested persons unemployed because of a labor dispute at premises distinctly separate from their place of employment, clearly indicate that the views of appellant and *amici* on this purported preemption issue are not the views of Congress.

It is the absence, not the presence, of protection of those innocently unemployed because of labor disputes, which infringes upon the uniformity of national labor policy. Blanket disqualifications in a tiny minority of jurisdictions simply give employers a bargainning advantage in those states which they would not have in the overwhelming majority of the jurisdictions of the United States. These special advantages, in addition to creating a clear hazard to the uniformity of national labor policy, are an invitation to employers to flock to these few locations, while increasing unemployment and the burdens on taxpayers in the rest of the Nation. Under these circumstances, these minority enactments operate both to infringe on the uniformity of national labor policy, and to encourage unemployment in those jurisdictions which have not adopted statutory schemes calculated to grant the maximum possible advantage to employers.

Viewed in its proper perspective, the prospect of future taxation for payment of benefits to employees who are innocent victims of a labor dispute would not be a significant factor influencing employer thinking during negotiations while the dispute is in progress. There would be no subsidization of involved or interested parties. The expense to the employer it not incurred while the dispute is in progress, but will be incurred through subsequent taxation, and can be absorbed in budgetary planning and the future costs to consumers of the employer's goods or services. Foremost in the mind of an employer during a labor dispute is the loss of income due to the stoppage of work, and not recoverable future tax liabilities. Even assuming, *arguendo*, that future tax liabilities have some real effect on the thinking of employers during labor negotiations, this prospective liability is simply one of many aspects of actual or potential detriment to their interests which employers might fairly be faced with during stoppages of work caused by labor disputes. The state is not required to remove all present or future burdens from an employer, and place them on innocent employees and the general public.

For the reasons discussed fully above in this Part, the former Ohio labor dispute disqualification, as applied to appellee and other similarly situated, was not rationally related to the furtherance of a legitimate state interest. In the absence of the required rational relationship, appellants Question No. 3 as to whether the statute, in its application to appellee and his fellow steelworkers, furthered a suitable governmental interest must be answered in the negative. And, with regard to appellant's Question No. 2 as to whether a state system of unemployment compensation may predicate disqualification on grounds other than fault, it also must be answered in the negative where the grounds are not

rationally related to furtherance of a legitimate state interest.

D.

THE FORMER OHIO LABOR DISPUTE DISQUALIFICATION VIOLATED THE RIGHT OF APPELLEE AND OTHERS SIMILARLY SITUATED TO DUE PROCESS OF LAW, SECURE AGAINST STATE ACTION UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A state's authority to enact unemployment compensation legislation has been justified as an exercise of the police power of the state. (See, *e.g.*, *Cottrell Clothing v. Teets*, 139 Colo. 558, 342 P.2d 1016 (1959).) However, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States always operates as a limitation on the improper exercise of the police power. (See generally, *Grenada Lumber Co. v. Mississippi*, 217 U.S. 533, 442-443 (1910); see also 16 *Am. Jur.* 2d, "Constitutional Law," Sec. 296.) In order to constitute a proper exercise of the police power, legislation must directly promote the general health, safety, welfare and morals, and be reasonable, and the means adopted to accomplish the legislative purpose must be suitable to the end in view, must be impartial in operation, and have a real and substantial relation to such purpose (*Teegardin v. Foley*, 166 Ohio St. 449 (1957); *Froelich v. City of Cleveland*, 99 Ohio St. 376 (1919); *Nolden v. City Comm'n*, 12 Ohio Misc. 205 (1966)).

Tested by the above standards governing the proper exercise of the police power, former Ohio Revised Code

Section 4141.29(D)(1)(a), as applied to appellee and others similarly situated, fails to meet the prerequisites of constitutionality. Appellee has brought out in Parts (A) and (C) of this brief that the legislative purposes for a labor dispute disqualification are (1) limitation of unemployment compensation benefits to persons involuntarily unemployed, (2) the preservation of the neutrality of the state in labor disputes, and (3) protection of the fiscal integrity of the unemployment compensation fund against special risks of depletion. It is modest to state that the former Ohio statute, as applied to appellee and his fellows, did not bear a real and substantial relation to the purported legislative purposes. The former statute, in such application, bore no relation to the stated purposes, real, substantial, or otherwise. Accordingly, the decision of the District Court below was indisputably correct in finding that the former Ohio statute violated due process of law as applied to appellee and others similarly situated (opinion of Court below, 408 F.Supp. at 1022).

Former Section 4141.29(D)(1)(a), in addition to failing to meet the basic prerequisites for constitutionality of an enactment under the police power of the state, is also unconstitutional in creating a permanent and irrebuttable, conclusive presumption which is not necessarily or universally true in fact. Such presumptions have been very recently found constitutionally deficient in a number of high court decisions, both state and federal. *Vlandis v. Kline*, 412 U.S. 441 (1973), involved a state statutory provision which created a permanent and irrebuttable presumption that a student attending a state educational institution remained a nonresident of the state during the entire period of such attendance, if the student had a legal address outside the state for any part of one year preceding his application for admission to the institution. The court in *Vlandis* found that the presumption

of continued nonresidency violated the Due Process Clause of the Fourteenth Amendment, as the presumption was not necessarily or universally true in fact, and the state had reasonable alternative means of determining the fact of residency (412 U.S. 452). In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the court struck down as violative of due process the regulations of two school boards which required respectively that pregnant teachers leave their employment at the beginning of the fifth and sixth month of pregnancy. The purported justification for the regulations was to maintain continuity of instruction, and to insulate the classroom from the presence of incapacited teachers. The court found that the regulations were not required to maintain continuity of instruction so long as the teachers gave adequate advance notice, and that the regulations created an insupportable conclusive presumption that every teacher who reached her fifth or sixth month of pregnancy was physically incapable of continuing her employment (414 U.S. 644). The court also concluded that the Fourteenth Amendment required that school boards employ alternative administrative means to determine the physical fitness of pregnant teachers (414 U.S. 647). Following *Vlandis*, and prior to *LaFleur*, this Court struck down an amendment to the Federal Food Stamp Act which rested on an irrebuttable presumption often contrary to fact (*United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973)). Most informative with regard to the instant case in this Court's *per curiam* decision of last term striking down the Utah unemployment compensation pregnancy disqualification on the ground that it created an insupportable conclusive presumption in violation of the Fourteenth Amendment (*Turner v. Dept. of Employment Security*, 423 U.S. 44 (1975); see also,

following the *Turner* case, and striking down the Colorado unemployment compensation pregnancy disqualification on the ground that it created an irrebuttable presumption violative of due process. *Sylvara v. Industrial Comm'n*, ____ Colo. ____, 550 P.2d 868 (1976)). Relying on reasoning similar to that employed in the above cases, the Supreme Court of Ohio, in *Kinney v. Kaiser Corp.*, 41 Ohio St.2d 120, 322 N.E.2d 880 (1975), invalidated on state and federal constitutional grounds three statutory jurisdictional prerequisites to consideration of death benefit claims under the state's workmen's compensation law. The court determined that the statute created a conclusive presumption that there was no casual connection between a work injury or occupational disease and death, if the dependents of a deceased worker could not establish one or more of the jurisdictional prerequisites. The presumption was invalid since the state had other reasonable and practicable means of establishing the existence or nonexistence of the necessary casual connection without resort to the presumption.

The former Ohio labor dispute disqualification in effect created a permanent, irrebuttable presumption that payment of unemployment compensation benefits to any individual unemployed because of a labor dispute at any premises owned or operated by his employer, anywhere in the United States, would in every instance (1) constitute payment to a person whose unemployment was voluntary, or (2) subsidize one party to the labor dispute, thereby violating the neutrality of the state in labor disputes, or (3) tend to encourage or prolong labor disputes, thereby creating a special risk to the fiscal intergrity of the unemployment compensation fund. Such a presumption is, of course, not necessarily or universally true in fact. It is also clear that the state had reasonable and practicable alternative

means for accomplishing the legitimate purposes of a labor dispute disqualification. It could adopt a statute similar to those in effect in Great Britain and the overwhelming majority of the jurisdictions of the United States (see Part (C), above in this brief), and the state, with regard to circumstances such as presented in the instant case, has been pursuing such an alternative since the 1975 amendment to the Ohio labor dispute disqualification (O.R.C., Sec. 4141.29(D)(1)(a) (Page's 1975 Supp.). The existence of these easily available, less drastic alternatives also answers any assertion that the former Ohio law was required to relieve the state of the burden of "looking into the mind of each individual employee" in order to discern which are involved or directly interested. The typical alternative legislation places the burden on the employee to show lack of participation, financing or direct interest, and disqualifies on the basis of involvement or interest on the part of any employees of the same grade or class as the claimant for benefits, regardless of his asserted individual lack of involvement or interest (see discussion under Part (C), above in this brief). Appellee, while not conceding in the slightest that the former statute can pass muster under appropriate equal protection standards, urges that the legislation is even more vulnerable under the irrebuttable presumption rationale, since consideration of the existence of available reasonable and practicable alternatives is consistently invoked under this due process analysis. (See cases cited immediately above; see also Comment, *The Conclusive Presumption Doctrine: Equal Process or Due Protection*, 72 Mich. L. Rev. 800 (1974); Comment, *Irrebuttable Presumptions: An Illusory Analysis?*, 27 Stan. L. Rev. 449 (1975).

Since the former Ohio labor dispute disqualification, as applied to appellee and others similarly situated, did

not bear a real and substantial relation to a legitimate legislative purpose, appellant's Question No. 3 must be answered in the negative. And, with regard to appellant's Question No. 2 as to whether a state system of unemployment compensation may predicate disqualification on grounds other than fault, it also must be answered in the negative where the grounds constitute legislative resort to conclusive, irrebuttable presumptions which are not necessarily or universally true in fact.

E.

THE DECISION OF THE THREE-JUDGE DISTRICT COURT IS IN CONFLICT WITH THE LAW OF ONLY TWO OF THE FIFTY-TWO JURISDICTIONS OF THE UNITED STATES WHICH HAVE UNEMPLOYMENT COMPENSATION STATUTES, AND IS IN ACCORD WITH THE OVERWHELMING WEIGHT OF LAW AND AUTHORITY.

1. The decision of the three-judge district court conflicts only with the former law of Ohio, and the present law of North Carolina.

Appellant asks as its Question No. 4 presented on this appeal whether the decision of the three-judge district court below is in conflict with other jurisdictions, and against the weight of authority. Appellant then answers this question in the affirmative in its Argument on the merits. (Brief of Appellant, pp. 2, 37.) Appellee has pointed out at length in Part C, above in this brief, that the type of disqualification imposed upon appellee and others similarly situated under former Ohio Revised Code, Sec. 4141.29(D)(1)(a), would have been imposed in only two of fifty-two

jurisdictions of the United States, Ohio and North Carolina. Appellee has also pointed out that this type of disqualification would not be imposed under the present law of Ohio. The fact is admitted that the decision of the court below is in conflict with the view taken by the Ohio Courts that the legislature may constitutionally disqualify any individual, under any circumstances, whose unemployment is the result of a labor dispute at any premises owned or operated by that individual's employer anywhere in the United States (*Cornell v. Bailey*, 163 Ohio St. 50, 25 N.E.2d 323 (1955); *Barnes v. Board of Review*, 1B Unempl. Ins. Rep., Ohio–New Matters Para. 8808 (Ohio App. 1972). However, the district court in the instant case quite correctly determined that the view of the Ohio Courts is insupportable where a disqualification is imposed upon persons in the position of appellee and his fellow workers.

Appellant cites several cases in its search for comfort in jurisdictions other than Ohio and North Carolina. Three of these are decisions of this Court. In *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937), this Court determined that the selection of beneficiaries under the Alabama unemployment compensation law was not so arbitrary or discriminatory as to infringe upon the Fourteenth Amendment to the Constitution of the United States. The validity of the Alabama labor dispute disqualification, as applied to individuals in no way involved or directly interested in a dispute, was not an issue before this Court in *Carmichael*. That case offers no enlightenment as to the state of Alabama law under circumstances such as those present in the instant case, but *the Alabama labor dispute disqualification has been consistently interpreted as inapplicable to persons who are in no way involved or directly interested in a dispute* (*Department of Industrial Relations v. Drummond*, 30 Ala. App. 78,

1 So.2d 395 (1940) *cert. denied*, 241 Ala. 142, 1 So.2d 402 (1940); *Usher v. Department of Industrial Relations*, 261 Ala. 509, 75 So.2d 165 (1954); *United States Steel Corporation v. Goodwin*, 267 Ala. 612, 104 So.2d 333 (1958); *Ex parte McCleney*, 286 Ala. 288, 239 So.2d 311 (1970)). The above interpretation of the Alabama statute has been religiously followed by the appellate courts of that state, and has remained unchanged by the Alabama legislature (*Ex parte McCleney, supra*, 239 So.2d at 314). Consequently, Alabama law is directly opposed to the application of a labor dispute disqualification in the manner which occurred in the instant case, and resort by appellant to unreported, unappended, and unavailable administrative decisions (Brief of Appellant, p. 29) is hardly persuasive in the face of consistent interpretations by the highest court of Alabama over a period of thirty-six years. For the above reasons, appellant's reliance on *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), as also supporting its view of Alabama law, is little less than frivolous.

Appellant maintains that this Court "upheld the 'reasonableness' " of the former Alaska labor dispute disqualification "on facts somewhat similar, but not identical to, the facts in the instant case." Appellee has carefully examined to opinion in *Unemployment Compensation Comm'n of Territory of Alaska v. Aragon*, 329 U.S. 143 (1947), *rehearing denied* 329 U.S. 834 (1947), and could not discern that portion of this Court's decision which passed upon the question of the "reasonableness" of the Alaska statute. Perhaps appellant can further enlighten the Court, and appellee, on this point in a reply memorandum or at oral argument. To avoid any semblance of indulging in semantic quibbling, appellee will grant that the *Aragon* case and the instant case are "somewhat similar" in that

both cases involve labor disputes and disqualification from unemployment compensation benefits. Beyond this, however, there are some rather startling, decisive dissimilarities. The claimants for benefits in *Aragon* were unemployed because of a stoppage of work at canneries where they had been employed in Alaska. The stoppage of work occurred when claimants' employers and the labor union of which claimants were members, and which was their recognized bargaining agent, failed to reach an agreement concerning the wages, hours, conditions of employment and the like of the claimants (329 U.S. 146-147). The facts in *Aragon* established that the claimants, through the agency of their labor union, were active participants in, and directly interested in a labor dispute in active progress at the premises where they were employed. That state of facts being the precise opposite of the facts in the instant case, appellee is at a complete loss in fathoming the manner in which the decision of the District Court below conflicts with *Aragon*. However, appellee, in support of the decision of the District Court, would like to note that this Court in *Aragon* did recognize that the Alaska unemployment compensation statute was *intended to benefit persons involuntarily unemployed through no fault of their own*, and that labor dispute disqualifications are a reflection of the broad policy that unemployment compensation legislation is designed to compensate only persons involuntarily unemployed (329 U.S. 154 n. 14).

Appellant next seeks solace in two *Michigan* and *Wisconsin* cases of over thirty-five years vintage. The case of *Chrysler Corporation v. Smith*, 297 Mich. 438, 298 N.W. 87 (1941), was expressly overruled in *Park v. Appeal Board of Michigan Emp. Sec. Comm'n.*, 355 Mich. 103, 94 N.W.2d 407, 420 (1959), *app. dismissed* 360 U.S. 251 (1959). Obviously, the *Smith* case does

not constitute supporting authority for any proposition of law. The decision in *Spielmann v. Industrial Comm'n.*, 236 Wis. 240, 295 N.W. 1 (1940), was based on a finding that three automobile manufacturing plants, synchronized and operated as a unit, were one "establishment" within the meaning of the Wisconsin labor dispute disqualification. Two of the plants were within forty miles of each other, two were within ten miles of each other, and they were found to constitute a single establishment in view of their physical proximity, functional integrality, and general unity. *Spielmann* cannot be taken to support denial of benefits to persons unemployed because of a labor dispute at premises distinctly remote from their place of employment, and where there is no functional integrality or general unity of the separate premises. Appellee directs the attention of this Court, and of appellant, to three more recent decisions of the Supreme Court of Wisconsin on the issue as to whether individuals are disqualified under Wisconsin law because of a labor dispute at locations remote from their place of employment. In *Abendroth v. Dept. of I., L., & H. Rel.*, 69 Wis.2d 736, 233 N.W.2d 343 (1975), the court determined that airline ground employees laid off at terminals in Madison and Milwaukee, because of a strike by pilots and the establishment of picket lines in Minneapolis and Seattle, were not disqualified from receipt of unemployment compensation benefits. (See similarly, *Liberty Trucking v. Dept. of Industry, etc.*, 57 Wis.2d 331, 204 N.W.2d 457 (1973); *Schaeffer v. Industrial Comm'n*, 11 Wis.2d 358, 105 N.W.2d 762 (1960).)

The above analysis establishes that the decision of the District Court below, in determining that payment of unemployment compensation benefits to individuals unemployed by reason of a labor dispute is required

under the circumstances presented in the instant case, is in conflict only with the former law of Ohio and the present law of North Carolina (see immediately below for discussion of North Carolina law).

2. The Abernathy case.

The decision of the District Court below is in conflict with the view expressed by the Supreme Court of North Carolina in *In Re Abernathy*, 259 N.C. 190, 130 S.E.2d 292 (1963), *cert. denied, sub. nom. Abernathy v. Eastern Airlines*, 375 U.S. 161 (1963). (This Court's denial of *certiorari*, of course, imports no expression of opinion on the merits of the *Abernathy* case.) While some factual distinctions might be urged between the instant case and *Abernathy*, they are not sufficient to avert the necessary conclusion that *Abernathy* clearly holds that a legislature may validly disqualify noninvolved, disinterested individuals from receipt of unemployment compensation benefits where their unemployment is due to a labor dispute at premises owned or operated by their employer anywhere in this world or universe. Consequently, appellee must quite candidly take the position that *Abernathy* was incorrectly decided, ans was the product of faulty legal and constitutional analysis.

The court in *Abernathy* does recognize initially that an unemployment compensation fund is to be used for the benefit of persons unemployed through no fault of their own (130 S.E.2d 296). The rest of the opinion is entirely devoted to justifying a clearly insupportable violation of this principle. The court quotes a legal periodical, citing the neutrality of the state and the need to preserve the integrity of the unemployment compensation fund as being the reasons behind labor

dispute disqualifications (130 S.E.2d 297). However, at this point, as throughout its opinion, the court fails to enlighten us as to why a labor dispute disqualification as drastic and overbroad as the North Carolina statute is required to serve the recognized purposes of such a disqualification. Also, the reference to the legal periodical article represents a classic case of incomplete quotation taken out of context. The paragraph of the article immediately following the portion quoted by the court reveals the very relevant fact, ignored by the court, that the British unemployment compensation law was amended in 1924 to exempt an individual from the labor dispute disqualification where it was shown that neigher he nor any employees of the same grade or class were participating or directly interested in the dispute (Haggart, *Unemployment Compensation During Labor Disputes*, 37 Neb. L. Rev. 668, 686 (1958)). The court next advises us that employers could not have contemplated that their tax money would be used to encourage any stoppage of work resulting from a labor dispute. The court, however, fails to enlighten as to how payment of benefits to persons in no way involved or directly interested in a labor dispute would tend "to encourage any stoppage of work". The court then states that at the time of initial adoption of unemployment compensation legislation, it is doubtful that it was in the contemplation of the Federal or state legislatures that unemployment compensation benefits would be payable to persons in the situation of the claimants in *Abernathy*. This rather broad assumption as to the history of unemployment compensation legislation is made in total disregard of the fact that, from the initial stages of unemployment compensation statutes, no jurisdiction, including North Carolina, sought to disqualify noninvolved and disinterested individuals who became unemployed by reason of a labor dispute at

premises distinctly remote from their place of employment. (See discussion of history of labor dispute disqualifications under Part C, above in this brief.) The type of disqualification imposed by the North Carolina statute was hardly in harmony with the historical evolvement of unemployment compensation law. To the contrary, it was the novel invention of the North Carolina legislature, enacted in 1961, conceived decades after the initial stages of unemployment compensation statutes, and calculated only to afford unwarranted tax relief to employers, while denying their employees relief from the suffering occasioned by involuntary unemployment. This type of disqualification, in the entire history of unemployment compensation law in the United States and Great Britain, has been imposed outside North Carolina only by the former Ohio statute, enacted in 1963 (1963 Ohio Laws, 130:972, 974), and repudiated by the Ohio legislature in 1975 (opinion of the court below, 408 F.Supp., at 1018). Consequently, the attempt of the court in *Abernathy* to establish a historical justification for the statute in issue was wholly without substance.

The court, following its attempt to find historical justification for the North Carolina statute, cites several cases from other jurisdictions in support of its position (130 S.E.2d 298-299). An examination of these cases reveals that none of them, save perhaps the cited Ohio case, supports the proposition that a labor dispute disqualification may properly be imposed on noninvolved, disinterested individuals, where the dispute is at premises distinctly remote from their place of employment (*Cameron v. DeBoard*, 230 Ore. 411, 370 P.2d 709 (1962) (facts supported finding of participation and direct interest of claimants); *De Paoli v. Ernst*, 73 Nev. 79, 309 P.2d 363 (1957) (joint negotiations for industry-wide contract affecting all claimants); *Spielmann v. Industrial Comm'n*, 236 Wis. 240, 295 N.W. 1

(1940) (not supportive of the *Abernathy* view for reasons discussed above in this Part of this brief); *Ford Motor Company v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950) (claimants, under principal-agent theory, bound by authorized acts of their union in initiating work stoppage); *Park v. Appeal Bd. of Michigan Emp. Sec. Comm'n*, 355 Mich. 103, 94 N.W.2d 407 (finding that Michigan plant and Ohio plant were not one establishment–prior case to the contrary overruled) *Magner v. Kinney*, 141 Neb. 122, 2 N.W.2d 689 (1942) (dispute between claimants' union and employers over contract covering terms and conditions of claimants' employment). The Ohio case relied on by the court, *Adamski v. Bureau of Unemp. Comp.*, 108 Ohio App. 198, 161 N.E.2d 907 (1959), is entirely irreconcilable with a later decision of the Supreme Court of Ohio in *Abnie v. Ford Motor Co.*, 175 Ohio St. 273, 194 N.E.2d 136 (1963), finding that automobile plants in Ohio and a plant in Michigan were not one establishment. Consequently, *Abnie* must be viewed as overruling *Adamski* by implication.

Thus far we have seen the *Abernathy* court relying on an insupportable interpretation of the history of unemployment compensation law, quoting a legal periodical article out of context in a misleading manner, and relying on case authority which was clearly distinguishable, save for one case which was subsequently stripped of its vitality. The court next treats us to some general observations on the validity of statutes where a legislature acts with reasonableness, and general statements as to the power of a legislature to make classifications (130 S.E.2d 299). Appellee disagrees with none of these general propositions, but feels compelled to point out that the court fails to indicate the manner in which the North Carolina statute is reasonably required to further any legitimate state interest when

applied to noninvolved, disinterested individuals unemployed because of a labor dispute at premises remote from their place of employment. The overall weakness of the reasoning in *Abernathy* is manifestly demonstrated by the court's concluding comments. The court points out that unemployment compensation acts commonly contain disqualifications for (1) discharge for misconduct, (2) refusal to accept suitable employment, and (3) participation in a strike. The court then astonishingly advises us that the challenged labor dispute disqualification involved a question of "degree and not principle." Appellee must strongly disagree. The three examples given by the court all involve some element of voluntariness or fault in the conduct of the disqualified individuals. The labor dispute disqualification, however, extends to situations where there is a total absence of these factors, and its application in these situations is not a matter of degree. It is a clear violation of the basic principles underlying all unemployment compensation statutes.

For the foregoing reasons, appellee respectfully submits that the *Abernathy* case was incorrectly decided, and offers no persuasive authority in support of the validity of the former Ohio statute as applied to appellee and others similarly situated.

3. The decision of the three-judge district court is in harmony with the overwhelming weight of law and authority.

Appellant's claim that the decision of the court below is against the weight of law and authority (Brief of Appellant, p. 37) is nothing short of baffling. It has been repeatedly pointed out at all stages of this case that persons in the position of appellee and his fellow steelworkers, in December of 1974, would have been

denied unemployment compensation benefits in only two of fifty-two jurisdictions of the United States, Ohio and North Carolina. The denial of benefits would now occur in only one of fifty-two jurisdictions, North Carolina. We are indeed confronted with a mystifying form of higher mathematics when the view formerly entertained in 3.8 percent of the jurisdictions of the United States, and now subscribed to in only 1.9 percent of those jurisdictions, is said to constitute the "weight of law and authority". The absurdity of this proposition is so patent that further discussion of the question is not warranted.

F.

U.S. STEEL CORPORATION AND REPUBLIC STEEL CORPORATION SUFFERED NO DEPRIVATION OF CONSTITUTIONAL RIGHTS.

The appellant raises as the fifth question presented on appeal the following question: "Does the decision of the Three Judge District Court deprive the respective employers [U.S. Steel Corporation and Republic Steel Corporation] of their substantive and procedural due process rights under the 5th and 14th Amendments?" Brief for Appellant at 2. As the following discussion of this question will demonstrate, U.S. Steel and Republic Steel for a number of reasons were not deprived of any constitutional rights.

1. The three judge district court did not deny U.S. Steel Corporation and Republic Steel Corporation any rights because the issue as to their alleged interest in the case was never presented to the court at any time prior to the date the court rendered its decision.

The appellant, in answering the fifth question presented on appeal in the affirmative, places emphasis on the allegation that U.S. Steel Corporation and Republic Steel Corporation were, in the appellant's words, "*denied* an opportunity to appear and present evidence bearing upon the economic effect of paying benefits." (Emphasis added.) Brief for Appellant at 34-5. Actually the lower court did not *deny* and could not have *denied* these corporations any rights because the issue relating to their alleged interest in this litigation was never presented to the three judge district court before the court rendered its decision.

a. The issue was never presented to the three judge district court by the appellant.

Rule 12 of the *Fed. R. Civ. P.* provides many means by which a party litigant may raise an issue relating to the lack of an indispensable party under Rule 19 of the *Fed. R. Civ. P.* Pursuant to Rule 12, this particular issue may be presented to the court in any one of four ways: (1) in a motion under 12(b); (2) in an answer or other pleading under Rule 7(a); (3) in a motion for judgment on the pleadings; (4) or at the trial on the merits.

In the present case, the appellant did not follow the aforesaid procedural mechanisms so as to present to the lower court the issue which the appellant now raises for

the first time in an appellate context.[1] For example, the appellant did not file a motion under Rule 12(b). Moreover, in its answer the appellant did not plead the defense of the lack of an indispensable party. Nor did the appellant ever suggest this as an issue in the briefs which were filed in the lower court proceeding. Finally, the appellant did not raise this issue at the hearing on the merits before the three judge court on October 23, 1975.[2]

b. The Motion to Intervene filed by U.S. Steel Corporation and the Motion To Intervene filed by Republic Steel Corporation were not filed until many weeks after the three judge district court rendered its decision.

The lower court rendered its decision on March 5, 1976. Some seven weeks later, on April 21, 1976, U.S. Steel Corporation filed a Motion to Intervene as a

[1] Notwithstanding the appellant's failure in this respect, this court, of course, has the authority to consider this issue. 3A *J. Moore, Federal Practice* par. 19.19 at 2582 (2d ed. 1974).

[2] In its brief the appellant asserts that the hearing on October 23, 1975, was not a hearing on the merits of the case. According to the appellant, "[i]t was the understanding of both parties in the court below that the issue before the Three Judge District Court concerned the propriety of class certification, the adequacy of notice to the class members and the necessity for a three judge court." Brief for Appellant at 34. While counsel for the appellee cannot definitively speak as to what the appellant's understanding was regarding the nature of this hearing, counsel for the appellee unquestionably understand that the hearing specifically related to the merits of the case. The appellant's position on this matter is incongruous, if not contemptuous of the three judge court, in light of the fact that prior to the hearing date in question counsel for the appellee and counsel for the appellant both filed briefs with the lower court, which briefs dealt extensively with the merits of the case.

matter of right pursuant to Rule 24(a) of the *Fed. R. Civ. P.* Subsequently, on May 26, 1976, Republic Steel Corporation followed suit and filed a Motion to Intervene as a matter of right. The three judge district court, in two separate orders, denied the aforesaid motions because the court determined that it no longer had jurisdiction to entertain these motions since the appellant had filed, prior to the dates the motions were filed, a Notice of Appeal. Alternatively, the court below ruled that the motions had not been filed in a timely fashion and that therefore they had to be overruled.

U.S. Steel Corporation and Republic Steel Corporation had a right to appeal the lower court's orders denying their respective Motions to Intervene. 3B *J. Moore, Federal Practice* par. 24.15 at 24-561 (2d ed. 1976). Yet, these companies elected not to appeal the orders and as a result the orders are *res judicata* as to these employers. See *Cheyenne River Sioux Tribe of Indians v. United States*, 338 F.2d 906 (8th Cir. 1964), *cert denied*, 382 U.S. 815 (1965).

In summary, because the appellant never raised the issue in the district court as to any alleged interests of U.S. Steel Corporation and Republic Steel Corporation in the present litigation and because neither of these corporations filed a timely motion to intervene, the three judge district court did not deny these corporations any constitutional rights.

2. U.S. Steel Corporation and Republic Steel Corporation did not suffer any deprivation of constitutional rights by not being party litigants in the present case.

a. No authority supports the appellant's arguments that the aforesaid corporations were denied their constitutional rights.

Appellant asserts that under Ohio's unemployment compensation experience rating system for employers

that U.S. Steel and Republic Steel will be subject to a higher unemployment compensation tax rate as a direct result of the lower court's decision.[3] This consequence, according to the appellant, "constitutes a denial of substantive due process in that there is no procedure by which a Federal Court may engage in the legislative function of establishing tax rates." Brief for Appellant at 36.

The appellant also argues, without any elaboration, that the lower court's decision, to the extent that it may affect several employers' tax rates, "is in violation of the Tenth Amendment of the United States Constitution." Brief for Appellant at 36.

The aforesaid arguments of the appellant are without merit as is evidenced by the fact that appellant cites no authority as supporting these propositions of law.

b. U.S. Steel Corporation and Republic Steel Corporation were not indispensable parties to litigation.

While never explicitly expressed by the appellant, the essence of the appellant's argument relating to the issue under discussion appears to be that U.S. Steel and Republic Steel were indispensable parties to the present litigation and since the three judge district court rendered its decision in their absence these corporations were denied their constitutional due process rights.

[3]The appellant alleges that as a result of the decision $2,156,800.00 in benefits could be paid. Brief for Appellant at 35. However, U.S. Steel and Republic Steel in their Briefs as *Amici Curiae* place the potential benefits at a much lower and more realistic figure. E.g., U.S. Steel cites a figure of $316,000.00, for its company, (Brief for U.S. Steel Corporation as *Amicus Curiae* at 2) and Republic Steel cites a figure of $454,700.00 for its company (Brief for Republic Steel Corporation as *Amicus Curiae* at 4) for a total of $770,700.00.

There is no doubt that any indispensable party issue is shrouded with constitutional due process overtones. See 3A *J. Moore, Federal Practice* par. 19.01-1 at 2118 (2d ed. 1974). However, in the present case, U.S. Steel and Republic Steel were not indispensable parties and therefore they were not denied due process of law under the Constitution.

Before a person can be deemed an indispensable party under Rule 19(b) of the *Fed. R. Civ. P.*, that person must first be determined to be a necessary party under Rule 19(a) of the *Fed. R. Civ. P.* Rule 19(a) provides in pertinent part:

> (a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

In the case at bar, the two steel companies were not necessary parties under the first provision of Rule 19(a) because complete relief between the appellee and the appellant was accorded the parties in the absence of the corporations. Indeed, even if the appellee's employer had been a party, the court below would have been powerless to award the appellee any relief against his employer since his employer does not control or administer the Ohio unemployment compensation system.

The second subdivision of Rule 19(a) is likewise not applicable to U.S. Steel and Republic Steel. These corporations are not necessary parties under Rule 19(a)(2) because their alleged interest in the subject of the action, *i.e.*, the payment of unemployment compensation benefits, either does not exist or is at the most indirect.

First, it is clear that the employers do not have an interest in the litigation merely because they pay money into the fund out of which unemployment compensation benefits are paid. This Court in *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951) decided the issue of "whether the National Labor Relations Board must deduct from back pay awards to discriminatorily discharged employees sums paid to them as unemployment compensation by a state agency." 340 U.S. at 361. In ruling that the Board had the power to enter an order refusing to deduct unemployment compensation benefits from back pay, this Court observed:

> Payments of unemployment compensation were not made to the employees by respondent the employer but by the State out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state. 340 U.S. at 364.

Secondly, U.S. Steel Corporation and Republic Steel Corporation do not have an interest in the subject of the action because their unemployment compensation tax rates may be affected by the payment of benefits to the appellee and other class members. This purported interest is simply too indirect and incidental to justify the appellant's contention. In *NLRB v. Gullett Gin Co.*,

this Court was confronted with the employer's argument the NLRB's order refusing to deduct unemployment compensation benefits from a back pay award was in the nature of a penalty because the employer would thereby be prevented from qualifying for a lower unemployment compensation tax rate. This Court summarily dismissed this argument in stating that "[w]e deem the described injury to be *merely* an *incidental* effect of an order which in other respects effectuates the policies of the federal act." (Emphasis added.) 340 U.S. at 365.

Finally, the untenable nature of the appellant's argument relating to the employers' interest in this case is highlighted when the argument's logical extension is considered. The Ohio unemployment compensation act in sec. 4141.25 of the *Ohio Rev. Code* establishes a procedure whereby the tax rates for *all* employers are adjusted on an annual basis depending on whether the unemployment compensation fund is above or below a "minimum safe level" as that term is defined in the act. For instance, each tax rate set forth in the experience rating table is reduced by two tenths of one per cent if the fund is 30% or more above the minimum safe level and each tax rate is increased five tenths of one per cent if the fund is sixty per cent below the minimum safe level, with there being gradations of tax decreases or increases between these two extremes. *Ohio Rev. Code* sec. 4141.25 (Page 1973). To the extent that the lower court's decision, if upheld, will result in the reduction of monies in the fund, the tax rate of every employer subject to the Ohio unemployment compensation act may be affected. Applying the appellant's argument that U.S. Steel and Republic Steel were indispensable parties because their tax rates may be affected, every employer subject to the Ohio act would be an indispensable party because every employer's tax

rate may be affected by the decision. This obviously untenable position demonstrates that the appellant's argument is not well founded.

Even though no case authority has been found which speaks directly to the issue of whether an employer is a necessary party in a case such as the present one, a recent opinion of this Court can be interpreted to inferentially stand for the proposition that an employer is not a necessary party in a case like the one at bar. In *Turner v. Department of Employment Security*, 423 U.S. 44 (1975), the petitioner challenged the constitutionality of a Utah statute which denied her unemployment compensation benefits for a period extending from 12 weeks before the expected date of the birth of her child until a date 6 weeks after her child was born. This Court in a *per curiam* opinion held that the statute was unconstitutional and reversed the Utah Supreme Court decision which had held that the statute was constitutional *Turner v. Department of Employment Security* 531 P.2d 870 (Utah 1975). As in the present case, the petitioner's employer in *Turner* was not a defendant in the lower court proceeding and was not a party in the proceeding before this Court. This fact is significant because Utah's unemployment compensation act has an experience rating system for employers (*Utah Code Ann.* Sec. 35-4-7 (1953)), and therefore the petitioner's employer's unemployment compensation tax rate may be adversely affected by this Court's decision. Using Appellant's argument, this fact should have necessitated the petitioner's employer being a party to the litigation. Yet, her employer was not a party to the litigation and the case was decided by this Court in a manner adverse to the petitioner's employer's interest in his favorable tax rate, thereby raising the inference that the petitioner's employer was neither a necessary nor an indispensable party in the proceedings.

And in the final analysis, because an unconstitutional statute confers no rights on any person (*Norton v. Shelby County*, 118 U.S. 425 (1886)), U.S. Steel and Republic Steel have no right to a lower unemployment compensation tax rate as a by-product of the enforcement by the appellant of the statute in question if said statute is constitutionally invalid, as the lower court found it to be.

3. U.S. Steel Corporation and Republic Steel Corporation have suffered no deprivation of any rights because the appellant has vigorously defended the appellee's challenge to the statute in question and because this Court has afforded these corporations the opportunity to advance their legal arguments opposing the lower court's decision.

a. The appellant has vigorously defended the appellee's challenge to the statute in question.

U.S. Steel and Republic Steel in their many motions before this Court have posited the theory that their interest in this case has not been represented because they have a pecuniary interest in this litigation while the appellant's interest is limited to enforcing the laws of the state of Ohio. Unfortunately, this initially enticing theory overlooks the fact that the ultimate interest or goal of the corporations and the appellant is the same, *i.e.*, to deny the appellee and other class members their unemployment compensation benefits. To protect this interest and to achieve this goal, the appellant has vigorously defended appellee's challenge to the statute in question. In vigorously defending this action, appellant has also championed and protected the interest of U.S. Steel and Republic Steel.

b. This court has afforded U.S. Steel and Republic Steel the opportunity to advance their legal arguments opposing the lower court's decision.

After the Notice of Appeal was filed by the appellant, U.S. Steel filed a Motion for Leave to File Brief *Amicus Curiae* and *Amicus Curiae* Brief in Support of Jurisdictional Statement, as did Republic Steel. Both these motions were granted insofar as they related to filing an *amicus curiae* brief in support of jurisdictional statement. After this Court noted probable jurisdiction, U.S. Steel filed a Motion for Leave to File Brief *Amicus Curiae* and *Amicus Curiae* Brief, as did Republic Steel. These motions were also granted. Consequently, both corporations' extensive briefs on the merits of the case are before this Court.

Inasmuch as U.S. Steel Corporation and Republic Steel Corporation have filed briefs with the Court setting forth in detail their arguments relative to the merits of this case, which arguments are basically the same as the arguments of the appellant, these corporations have been afforded adequate opportunity to protect their alleged interest in this litigation.

CONCLUSION

Appellee submits that section 4141.29(D)(1)(a) of the Ohio Revised Code prior to its amendment by the Ohio Legislature in 1975 was in fatal conflict with controlling federal law and furthermore that said statute was unconstitutional under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Therefore, appellee respectfully requests that the decision of the United States District Court for the Northern District of Ohio be affirmed.

Respectfully submitted,

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